TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER,

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1956

CERTIORARI GRANTED MARCH 12, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER,

vs.

WALTER KRUEGER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

1-2 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed Dec. 9, 1955

The petition of the relator WALTER KRUEGER, above-named, respectively alleges and shows to the Court as follows:

1. Relator is a citizen of the United States and a resident of the State of Texas, and brings this Petition on behalf of his daughter, DOROTHY KRUEGER SMITH.

2. The said DOROTHY KRUEGER SMITH is a citizen of the United States, and is now in custody of the respondent NINA KINSELLA, Warden of the Federal Reformatory for Women at Alderson within the territorial limits of the Southern District of West Virginia, and is unlawfully imprisoned and restrained of her liberty by respondent as said Warden, and under color of and pursuant to the sentence of a certain court-martial, in violation of her rights under the Constitution and laws of the United States, all as more particularly hereinafter recited.

3. In October 1952, the said DOROTHY KRUEGER SMITH, was living in Tokyo, Japan, in quarters furnished by the United States Government, with her minor children and her husband AUBREY D. SMITH. The said AUBREY D. SMITH was then a Colonel in the United States Army, assigned to Headquarters, Far East Command, and the said DOROTHY KRUEGER SMITH and their children had been furnished Government transportation to Japan as his dependents, and had similarly been furnished such commissary privileges and medical care as the United States Army customarily furnishes to the dependents of its personnel overseas.

4. At all times hereinafter material, the United States was at peace with Japan, the Multilateral Treaty of Peace signed September 8, 1951 (3 U. S. Treaties 3169) having become effective on April 28, 1952. At all times hereinafter material, the United States Army was in Japan, not as a military occupant by right of conquest pursuant to that branch of international law known as the law of war, but by virtue of the consent of the Japanese Government expressed in the Security Treaty between the United States and Japan (3 U. S. Treaties 3329), which Security Treaty became effective on April 28, 1952.

5. On October 4, 1952, while emotionally disturbed, and while in a condition which some psychiatrists later diagnosed as the

equivalent of legal insanity, though other psychiatrists differed, the said DOROTHY KRUEGER SMITH stabbed her said husband AUBREY D. SMITH so seriously that he died the next day in consequence of the injury so inflicted.

6. Thereafter, purporting to act under the authority of Article 2(11) of the Uniform Code of Military Justice (50 U. S. C. §552(11)), Brigadier General Onslow S. Rolfe, Army of the United States, Commanding General of the Headquarters and Service Command, a subordinate unit under the Far East Command, caused the said DOROTHY KRUEGER SMITH to be tried by a general court-martial of the United States Army convened at Toyko, Japan, on a charge of premeditated murder in violation of Article 118(1) of the Uniform Code of Military Justice (50 U. S. C. § 712(1)).

4 7. The said general court-martial was appointed by the said Brigadier General Onslow S. Rolfe, Army of the United States, pursuant to paragraph 10 of Special Orders 203, Headquarters, Headquarters and Service Command, Far East Command, dated December 16, 1952. The senior member of the said general court-martial so appointed was Major General Joseph P. Sullivan, Army of the United States.

8. The said DOROTHY KRUEGER SMITH was accordingly tried by said general court-martial on January 5 to 10th, 1953, and on January 10, 1953, was convicted of premeditated murder and sentenced to life imprisonment. The said Major General Joseph P. Sullivan, Army of the United States, served as president of the said general court-martial throughout the entire proceedings, participated in the voting on the findings and sentence, and as said president announced both findings and sentence to the accused.

9. The said findings and sentence were duly reviewed as provided in Articles 60-61, and 64-67, Uniform Code of Military Justice (50 U. S. C. §§ 647-648, 651-654). The findings and sentence were approved by the convening authority. Thereafter they were affirmed by a Board of Review in the Office of The Judge Advocate General of the Army in a decision reported at 10 CMR 350, and adhered to on reconsideration, 13 CMR 307. Finally, on December 30, 1954, the conviction was affirmed by the United States Court of Military Appeals in a decision reported at 5 USMA 314 and 17 CMR 314.

10. A Petition for New Trial filed pursuant to Article 73, Uniform Code of Military Justice (50 U. S. C. § 660) was referred to the Board of Review pursuant to paragraph 109*c* of the *Manual for Courts-Martial, U. S., 1951*, and was denied by it on May 26, 1953, in proceedings reported at 10 CMR at 369-370.

5 11. In due course, the said DOROTHY KRUEGER SMITH was returned to the United States, in custody, and now, and for

some time last past has been in the custody of the respondent KINSELLA at the Federal Reformatory for Women at Alderson within the territorial limits of the Southern District of West Virginia, under restraint imposed by the respondent under color of and pursuant to the sentence of the general court-martial proceeding hereinabove referred to.

12. The said custody, imprisonment, and restraint of the said DOROTHY KRUEGER SMITH are illegal, because the general court-martial that tried her was without jurisdiction to do so.

13. If it be assumed that Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552 (11)), *supra*, ever validly conferred jurisdiction on the United States Army to try the said DOROTHY KRUEGER SMITH as a person "accompanying the armed forces without the continental limits of the United States," then the trial was a nullity for the reason that the general court-martial had no jurisdiction because it was improperly constituted, as follows:

A court-martial is created by an appointing order issued by the convening authority. Here the convening authority was a Brigadier General, Army of the United States. He could not therefore lawfully give an order to a Major General, Army of the United States. Consequently the order purporting to convene the general court-martial that tried the said DOROTHY KRUEGER SMITH was void, and its proceedings were a nullity.

14. More fundamentally, however, Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), which purports to subject to military jurisdiction in time of peace the dependent wife of an officer of the Army who has herself no functional relationship with or to the armed forces, is unconstitutional because it violates both Article III, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, which severally guarantee to the said DOROTHY KRUEGER SMITH, a civilian, the right to a trial by jury; and because the power conferred on Congress by Section 8 of Article I of the Constitution to "make Rules for the Government and Regulation of the land and naval forces" does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace.

WHEREFORE your relator prays that a writ of habeas corpus be granted and issued, directed to NINA KINSELLA, Warden of the Federal Reformatory for Women at Alderson, West Virginia, commanding her to produce the body of the said DOROTHY KRUEGER SMITH before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of the said DOROTHY KRUEGER

SMITH, and that the said DOROTHY KRUEGER SMITH be ordered discharged from the detention and imprisonment aforesaid.

WALTER KRUEGER,
Relator

JOHN C. MORRISON,
305 Morrison Building,
Charleston, West Virginia,
Attorney for the Relator.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda, Maryland,
Of Counsel.

7 *Duly sworn to by Walter Krueger. Jurat omitted in in printing.*

8 In United States District Court

[Title omitted]

ORDER GRANTING WRIT OF HABEAS CORPUS, ETC.—December 9, 1955

This 9th day of December, 1955, came Walter Krueger (United States of America ex. rel.) by John C. Morrison, Frederick Bernays Wiener and Adam Richmond, his attorneys, and tendered and asked leave to file his Petition for Writ of Habeas Corpus herein, which Petition is ORDERED filed.

The Court, having considered the allegations of said Petition and having heard the argument of counsel thereon, it is ORDERED that a writ of habeas corpus be and the same is hereby granted and issued, directed to Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, West Virginia, commanding her to produce the body of Dorothy Krueger Smith before this Court for a hearing on said Petition at Charleston, West Virginia, on the 20th day of December, 1955, at 10:00 o'clock A.M., Eastern Standard Time.

Enter:

BEN MOORE,
United States District Judge.

[File endorsement omitted.]

9 In the United States District Court for the Southern District of West Virginia

[Title omitted]

WRIT OF HABEAS CORPUS—December 9, 1955

The President of the United States to Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia.

GREETING:

We command you that you have the body of Dorothy Krueger Smith, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before the United States District Court in and for the Southern District of West Virginia, at the Federal Court House in Charleston, West Virginia, on the 20th day of December, 1955, at 10:00 o'clock, A.M., to do and receive what shall then and there be considered concerning the said Dorothy Krueger Smith, and have you then and there this writ.

Witness, the Honorable Ben Moore, Judge of the District Court of the United States.

HOMER W. HANNA,
Clerk of the District Court in and for the Southern District of West Virginia.

Issued this 9th day of December, 1955.

10 In United States District Court

RETURN OF WRIT OF HABEAS CORPUS

Received this writ at Charleston, West Va., on the 9th., day of December 1955, and executed same on the 12th., day of December 1955, by serving a true copy on the within *named* Nina Kinsella warden of Federal Reformatory for Women, Alderson, West Va.

RUSSELL R. BELL,
U. S. Marshal.
By W. W. THOMPSON,
Deputy.

Expense:

Mileage, 4 mi. @ 10¢	$ .40
Service,	2.00
Total	$2.40

Filed. Dec. 13, 1955. In Clerk's Office U. S., Dist. Court, So. Dist. W. Va., Homer W Hanna, Clerk.

11 [File endorsement omitted]

In the United States District Court For the Southern District of West Virginia

[Title omitted]

RETURN AND ANSWER—Filed December 15, 1955

Comes now the respondent, Nina Kinsella, Warden, United States Federal Reformatory for Women, Alderson, West Virginia, on whom has been served a copy of a writ of habeas corpus for the production of Dorothy Krueger Smith, and by her attorney makes return and answer to the said writ and respectfully shows to the Court that she holds the said Dorothy Krueger Smith by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said Dorothy Krueger Smith, a dependent wife accompanying the armed forces within the meaning of Article 2 (10) and (11) Uniform Code of Military Justice (50 USC 552) and therefore subject to military jurisdiction, was duly arraigned for the offense of premeditated murder in violation of the Article 118, Uniform Code of Military Justice (50 USC 712), before a general court-martial convened by Special Orders No 203, Headquarters and Service Command, Far East Command, 8232d Army Unit, APO 500, dated December 16, 1952, was convicted thereof by the court-martial, and was sentenced to life imprisonment, which
12 sentence was duly approved on February 9, 1953, by the convening authority as required by Articles 61 and 64, Uniform Code of Military Justice (50 USC 648 and 651 respectively); that upon appellate review the record of trial was held to be legally sufficient to support the findings of guilty and the sentence, and the sentence was approved and affirmed in accordance with Articles 66 and 67, Uniform Code of Military Justice (50 USC 653 and 654 respectively). An authenticated copy of the order promulgating the sentence as approved and affirmed is attached hereto (Exhibit A).

II

Answering the allegations contained in the petition for writ of habeas corpus the respondent admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that Dorothy Krueger Smith, a citizen of the United

States, is now confined pursuant to the sentence of a general court-martial in the Federal Reformatory for Women, Alderson, West Virginia, in the custody of the respondent Nina Kinsella, Warden, within the territorial limits of the Southern District of West Virginia; and denies all other allegations of paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition and alleges that these admitted facts show that Dorothy Krueger Smith was a person accompanying the armed forces within the meaning of Article 2 (10) and (11), Uniform Code of Military Justice, (50 U.S.C. 552).

4. Admits the allegations of fact contained in paragraph 4 of the petition, and alleges that all events material hereto occurred in a "time of war" as that term is used in the Uniform Code of Military Justice.

5. Admits that on October 4, 1952, Dorothy Krueger Smith stabbed her husband, Aubrey D. Smith, and inflicted such serious wounds that he died the following day; alleges that the said
13 Dorothy Krueger Smith, was found by the court-martial, the board of review, and the United States Court of Military Appeals, to have been legally sane at the time that she did with premeditation murder her husband; and denies the remaining allegations contained in paragraph 5 of the petition.

6. Admits that Brigadier General Onslow S. Rolfe, Commanding General, Headquarters Service Command, a subordinate unit under the Far East Command, caused Dorothy Krueger Smith to be tried by a general court-martial of the United States Army convened at Tokyo, Japan, on a charge of premeditated murder in violation of Article 118 Uniform Code of Military Justice (50 USC 712), pursuant to the authority of Article 2 (10) and (11) of the Uniform Code of Military Justice; alleges that the action of Brigadier General Onslow S. Rolfe was *proper and within* his authority under the provisions of the Uniform Code of Military Justice; and denies the remaining allegations contained in paragraph 6 of the petition.

7. Admits the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition.

9. Admits the allegations contained in paragraph 9 of the petition.

10. Admits the allegations contained in paragraph 10 of the petition.

11. Admits the allegations contained in paragraph 12 of the petition.

13. Admits that the officer who convened the court-martial was a

Brigadier General, Army of the United States; alleges that those members of the court-martial who were assigned to other headquarters were appointed with the concurrence of the Commander in Chief, Far East; further alleges that Dorothy Krueger Smith was a person subject to trial before a court-martial and that the court-martial which tried her was convened and constituted as required by law; and denies the remaining allegations contained in paragraph 13 of the petition.

14. Denies the allegations contained in paragraph 14 of the petition.

14 In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the Court the body of the said Dorothy Krueger Smith, and for the reasons hereinbefore set forth respectfully prays the court to discharge the said writ, dismiss the petition, and remand Dorothy Krueger Smith to the custody of the respondent.

DUNCAN W. DOUGHERTY,
United States Attorney,
PERCY H. BROWN,
Assistant United States Attorney,
LT. COL. JAMES W. BOOTH,
Judge Advocate General's Corps,
United States Army,
LT. COL. CECIL L. FORINASH,
Judge Advocate General's Corps,
United States Army,
Counsel for Respondent.

15 EXHIBIT "A" TO RETURN AND ANSWER

United States of America

DEPARTMENT OF THE ARMY

Washington, December 14, 1955

I HEREBY CERTIFY that the attached document pertaining to the general court-martial case of Dorothy Krueger Smith is a true and correct copy of General Court-Martial Orders No. 9, Headquarters Second Army, Fort George G. Meade, Maryland, dated 14 February 1955, which is on file in the office of The Judge Advocate General, Department of the Army, Washington 25, D. C.

EUGENE M. CAFFEY,
Major General, USA,
The Judge Advocate General.

I HEREBY CERTIFY that Major Eugene M. Caffey, who signed the foregoing certificate, is The Judge Advocate General of the Army, and as such has the legal custody of the records herein described,

and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, Wilber M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 14th day of December, 1955.

WILBER M. BRUCKER,
Secretary of the Army.

By JAMES C. COOK,
Deputy Administrative Assistant.

[Seal]

16-17 HEADQUARTERS SECOND ARMY

Office of the Commanding General Fort George G. Meade, Maryland

GENERAL COURT-MARTIAL
ORDER NUMBER 9

14 February 1955.

In the general court-martial case of DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters, Far East Command, APO 500, a person accompanying the Armed Forces without the continental limits of the United States, and without the following Territories: That part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico and the Virgin Islands, and a person subject to the Uniform Code of Military Justice under the provisions of the Administrative Agreement pursuant to Article III of the Security Treaty between the United States of America and Japan, the sentence to confinement at hard labor for the term of her natural life, as promulgated in General Court-Martial Orders No. 20, Headquarters, Headquarters and Service Command, Far East Command, APO 500, dated 9 February 1953, has been affirmed pursuant to Articles 66 and 67. The provisions of Article 71c having been complied with, the sentence will be duly executed. A United States penitentiary, reformatory or other such institution is designated as the place of confinement and the confinement will be served therein, or elsewhere as competent authority may direct. The prisoner will be committed to the custody of The Attorney General or his designated representative, and will be delivered into the custody of The Attorney General at the United States Public Health Service Hospital, Lexington, Kentucky.

BY COMMAND OF LIEUTENANT GENERAL PARKS:

HUGH P. HARRIS,
Brigadier General, General Staff,
Chief of Staff.

18 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

RELATOR'S TRAVERSE TO RESPONDENT'S RETURN AND ANSWER—Filed December 20, 1955

Comes now WALTER KRUEGER, relator in the above-entitled cause, by his attorneys, and files this his traverse to the return and answer of respondent to the writ of habeas corpus issued herein.

Relator, for reply to the return and answer to the writ of habeas corpus, states that he hereby realleges and restates each and every averment and allegation contained and set forth in his petition with the same force and effect as though the same were set forth verbatim in this traverse.

Further replying to and answering said return, relator denies and alleges as follows:

1. Answering par. I of respondent's return and answer, relator denies that his daughter, DOROTHY KRUEGER SMITH, was, at any time material herein, accompanying the armed forces of the United States either "in time of war" or "in the field" within the meaning of Article 2(10), Uniform Code of Military Justice (50 U. S. C. § 552(10)); denies that the said DOROTHY KRUEGER SMITH was a person accompanying the armed forces of the United States within the meaning or intendment of Article 2(11), Uniform Code

19 of Military Justice (50 U. S. C. § 552(11)); and avers that neither the cited articles nor any other act of Congress could constitutionally subject the said DOROTHY KRUEGER SMITH to military jurisdiction in the admitted circumstances of this case, for the reason that no such power is granted to Congress by Article I, Section 8, Clause 14 of the Constitution, and for the further reason that any attempt to subject the said DOROTHY KRUEGER SMITH to military jurisdiction would and does violate Article III, Section 2, Paragraph 3 of, and the Sixth Amendment to, the Constitution of the United States.

2. Answering par. II(3) of respondent's answer and return, relator makes the same denials and averments contained in paragraph 1 of this traverse, immediately above, which are incorporated by reference.

3. Answering par. II(4) of respondent's answer and return, relator denies that all events material hereto ocurred in a "time of war" as used in the Uniform Code of Military Justice; and specifically denies that any of the events material hereto occurred

in a time of war in a constitutional sense so as to subject DOROTHY KRUEGER SMITH, a civilian, to military jurisdiction.

4. Answering par. II(6) of respondent's answer and return, relator makes the same denials and averments contained in paragraph one (1) of this traverse, which are incorporated by reference.

5. Answering par. II(13) of respondent's answer and return, relator makes the same denials and averments contained in paragraph 1 of this traverse, which are incorporated by reference; and relator further avers that the undisputed and undenied allegations of fact in par. 13 of the petition and in par. II-(13) of the answer and return establish as a matter of law that the general court-martial that tried the said DOROTHY KRUEGER SMITH was not legally constituted.

20-22½

WHEREFORE your relator prays that the writ of habeas corpus heretofore issued be sustained and made final and absolute, and that the said DOROTHY KRUEGER SMITH be discharged from all custody and restraint.

WALTER KRUEGER,
Relator,

By JOHN C. MORRISON,
305 Morrison Building,
Charleston 22, W. Va.,
His Attorney.

FREDERICK BERNAYS WIENER,
1025 Connecticut Ave., N.W.,
Washington 6, D. C.,
ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda, Maryland,
Of Counsel.

23 [File endorsement omitted]

In United States District Court

UNITED STATES OF AMERICA on the relation of WALTER KRUEGER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, ALDERSON, West Virginia

Habeas Corpus
No. 1726

OPINION—January 16, 1956

John C. Morrison, Esq.,
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305 Morrison Building,
Charleston 22, West Virginia.
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Washington 6, D. C.
Adam Richmond, Esq.,
Attorney at Law,
7816 Glenbrook Road,
Bethesda, Maryland, For Relator.
Duncan W. Daugherty,
United States Attorney,
Percy H. Brown,
Assistant United States Attorney,
Lt. Colonel James W. Booth, JAGC,
Judge Advocate General's Corps,
United States Army,
Lt. Colonel Cecil L. Forinash, JAGC,
Judge Advocate General's Corps,
United States Army, For Respondent.
BEN MOORE,
District Judge.

24 OPINION

On January 10, 1953, Mrs. Dorothy Krueger Smith was convicted by a United States Army general court-martial, sitting in Tokyo, Japan, of the premeditated murder of her husband, Colonel Aubrey D. Smith. The killing occurred on the night of October 3 or early morning of October 4, 1952, at the quarters occupied by the couple within the area of the Washington Heights Housing Project.

Mrs. Smith was sentenced to imprisonment for life. She appealed through all available military channels, but her conviction and sentence were finally affirmed by the Court of Military Appeals on December 30, 1954. She is now held as a prisoner in the Federal Reformatory for Women, a United States Government Penal Institution located at Alderson, in the Southern Judicial District of West Virginia. Her father, Lieutenant General Walter Krueger, U. S. Army, retired, filed a petition with this Court on December 9, 1955, praying for a writ of habeas corpus on her behalf, and for her release from imprisonment on the ground that the court-martial lacked jurisdiction to try her.

I awarded the preliminary writ, and on December 20, 1955, Mrs. Smith was brought into court at Charleston by the respondent, Nina Kinsella, Warden of the institution where she is confined. The only evidence, aside from the allegations and admissions in the petition and return, were the certified record of the entire proceedings in the military courts and boards, both trial and appel-
25 late, and a copy of the petition recently filed in the United States District Court for the District of Columbia in the case of *Clarice B. Covert vs. Curtis Reid, Superintendent of the District of Columbia jail.* Counsel were given unlimited time to present their arguments, as well as time to file further briefs in addition to those submitted prior to the hearing.

It is pertinent to observe here that Brigadier General Onslow S. Rolfe, Commander of Headquarters and Service Command, Far East Command, detailed several officers from other commands to serve on the court-martial, among whom was Major General Joseph P. Sullivan. General Sullivan's service was with the concurrence of his commanding officer, Lieutenant General Mark Clark, Commander in Chief, Far East Command. All the other officers who were to sit on the court-martial were subordinate in rank to General Rolfe.

Mrs. Smith, who was represented at the trial and in all stages of her appeal by Brigadier General Adam Richmond, a retired officer of long legal and military experience, made no objection to the composition of the court-martial before any military court. The challenge is brought forth at this hearing for the first time.

In attacking the jurisdiction of the court-martial, petitioner advances two arguments:

1. That the court was illegally constituted, in that one of the officers who composed it was a Major General, whereas the convening officer was a Brigadier General;

26 2. That Mrs. Smith, being a civilian, was not subject to the Code of Military Justice, under the circumstances which prevailed at the time of the alleged offense and at the time of her trial.

The requirements for eligibility to sit as a member of a general court-martial are set out in Article 25 of the Uniform Code of Military Justice (50 U.S.C. 589) as follows:

> "Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial."

There is thus no doubt that Major General Sullivan was eligible in the ordinary sense of the word, to serve as a member of a general court-martial. It is argued by counsel for petitioner that "eligibility" necessarily includes inferiority in rank to the convening officer; and that, since Brigadier General Rolfe, being subordinate in rank to Major General Sullivan, had no authority to order the latter to do anything, he could not therefore make him a member of a general court-martial.

At most, this argument turns on a mere technicality. It is not even pretended that Mrs. Smith suffered any disadvantage, or that her rights were in any way affected by the presence of Major General Sullivan as a member of the court-martial. Actually, General Sullivan was acting under the orders of his superior officer, General Mark Clark. The Manual for Courts-Martial provides for situations of this kind by the following language (see Manual for Courts-Martial, 1951, subparagraph 4 f).

27 > "Appointment of members and law officers from other commands of the same armed force.—The convening authority may, with the concurrence of their proper commander, appoint, as members of a court-martial. . . . eligible persons of the same armed force who are not otherwise under his command. Concurrence of the proper commander may be oral and need not be evidenced by the record of trial".

General Rolfe's convening of the court was an administrative, as distinguished from an operational command. In civil affairs, it would be regarded merely as an appointment, and it is so referred to in the above excerpt from the Manual for Courts-Martial. I can find nothing in the Code of Military Justice to indicate that in performing such a function distinctions of rank are important. Possibly General Sullivan might have had grounds based on seniority of rank for declining to sit on the court; possibly Mrs. Smith might have objected at the time to his sitting; but he having willingly acceded to the convening order, and she not having objected at any time to his sitting as a member of the court-martial, I hold that the objection to General Sullivan as a member of the court-martial, if there was a substantial objection, has been waived, and cannot now be raised. The applicable rule of deci-

sion is found in the case of *Swaim* v. *United States*, 165 U. S. 553, rather than in *McClaughry* v. *Deming*, 186 U.S. 49, relied on by petitioner.

Having concluded that the technical or procedural objection to the jurisdiction of the court-martial is without merit, I am forced to consider the constitutional question raised by the petitioner.

Counsel for petitioner very frankly says that the present effort to procure Mrs. Smith's release on this writ of habeas corpus
28 stems from the recent decision of the United States Supreme Court in the case of *United States of America*, ex rel., *Audrey M. Toth*, vs. *Donald A. Quarles, Secretary of the United States Air Force*, 76 Sup. Ct. 1 (1955), followed by the action of the District Court of the District of Columbia in freeing Mrs. Clarice Covert in circumstances very similar to those which surround Mrs. Smith. The *Covert* case has not yet been reported.

I think the *Toth* case is readily distinguishable. Toth was a civilian residing in the continental United States, who, at the time charges were made against him, had no connection with the armed forces. The decision in that case turned on the right of Toth to claim the protection of those Constitutional guaranties which secure to persons accused of crime in this country, except those who are in the land or naval forces, the traditional safeguards which accompany every criminal trial in the civil courts. Chief among these are the right to have the charge, if a felony, presented to a grand jury, the right to trial by jury, and to have these rights passed on by courts whose judges are a part of our Constitutional system of civil courts. Not all of these safeguards are or can be provided in a trial by court-martial.

In the *Covert* case the status of the petitioner was that of a person who, having been charged and convicted by a United States Army court-martial in a foreign land, was now within the borders of the United States, her conviction reversed, and she, no longer a follower of the army, merely awaiting trial on the original
29 charge. Judge Tamm thought that under these circumstances the principle announced in the *Toth* case obliged him to grant her freedom pursuant to the writ of habeas corpus. I do not think it necessary, because of the different circumstances in the case before me, either to adopt or reject his reasoning.

Mrs. Smith's situation differed from that of Toth in at least two significant respects:

(1) She was not living in the United States, nor present there when she was charged with the murder of her husband;

(2) She was connected with the army as a person "accompanying the armed forces without the continental limits of the United States;" both when she committed the act and when she was arrested and tried for it.

It may be useful at this point to examine the sections of Article 2 of the Code of Military Justice, "Title 50, U.S.C.A., §552," which specify the conditions under which persons accompanying the armed forces may be tried by court-martial.

The pertinent sections of Article 2 read as follows:

"The following persons are subject to this (chapter):

"_____

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party, or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . ."

It is to be observed that Article 2(10) gives unlimited court-martial jurisdiction over followers of the army in time of war and in the field. While it is not argued by counsel for petitioner that Article 2(10) in any way exceeds the Constitutional power of Congress, it is proper, I think, to point out the distinctions drawn by Congress itself between Article 2(10) and Article 2(11).

The reason for such a broad grant of court-martial jurisdiction in time of war is obvious. It is essential that the operations of an army in the field be unobstructed by the acts of any person, whatever his status. Even if the Constitution were silent on the subject, military commanders in the field of war would nevertheless have the usual and necessary court-martial powers by virtue of the law of war itself. Congress having been granted in the Constitution the powers to "declare war" and to "raise and support armies," as well as to "make rules for the government and regulation of the land and naval forces," the last mentioned power, insofar as it is to operate in time of war, is referable to the others, and is co-extensive in scope with the law of war under which court-martial jurisdiction is permitted over certain classes of civilians. *Madsen* vs. *Kinsella*, 343 U.S. 341 (1952).

Article 2(11) is not limited to a time of war or to the field of action. It purports to extend the coverage of the Code of
31 Military Justice (and hence the jurisdiction of courts-martial) to all persons "accompanying the armed forces" abroad. This coverage, however, is conditional. If some accepted rule of international law or the terms of some treaty or agreement to which the United States is a party are applicable to a particular case, then by its own limitations Article 2(11) does not come into play.

Now, it is a well recognized maxim of the law of nations that a citizen of one country who commits a local crime in another country

is amenable to the laws of the latter. In the absence of a treaty he is entitled to claim no extra-territorial rights. If he believes himself to have been unfairly dealt with, his only recourse is through diplomatic channels. From this maxim flows the principle, recognized by the Supreme Court in the case of *In Re Ross*, 140 U.S. 453 (1891), and never repudiated in any case that I have found, that the United States Constitution gives no protection to persons accused of committing local crimes in foreign countries.

Counsel for petitioner, in his brief and in argument, has cited several cases from which he argues that the doctrine that the Constitution does not "follow the flag" is outmoded, and is not now the law. *United States* v. *Flores*, 289 U.S. 137 (1933); *Blackmer* v. *United States*, 284 U.S. 421 (1932); *United States* v. *Bowman*, 260 U.S. 94 (1922); *Jones* v. *United States*, 137 U.S. 202 (1890); *Best* v. *United States*, 184 F. 2d 131 (1st Cir. 1950). On examination of these cases it is found that in every instance the crime involved was one denounced by some statute of the United States, and triable in some one of our District Courts. In no instance
32 has it been even contended that a person accused of a purely local crime in a foreign country may claim any of the procedural rights guaranteed in the Constitution of the United States.

It is plain, therefore, that the rule of *Toth* vs. *Quarles* does not apply here. Still, as I have indicated, it is not enough to find that the provisions of our Bill of Rights and other prohibitory sections of our Constitution did not stand between Mrs. Smith and her trial by court-martial. If the jurisdiction is to be sustained, we must go farther, and discover in that instrument an affirmative grant of Congressional power, either expressly or by necessary implication.

It is in evidence that in the year 1952 the newly re-organized Government of Japan entered into a treaty with the United States, which was duly ratified by the Senate. By an administrative agreement implementing that treaty, the Japanese Government ceded to the United States, through its military courts and authorities, all jurisdiction to try offenses committed in Japan by dependents of members of the armed forces, excluding those of Japanese nationality. Had this treaty been in effect at the time Article 2(11) of the Code of Military Justice was enacted, it might be cited as the source of Congressional power to pass this act; but it would scarcely be contended, I think, that a piece of legislation, if it were void for lack of constitutional authority when passed, could be validated by a later treaty, even though Congress might subsequently act freely in that field. However, the treaty
33 did remove the limitations which in its absence would have prevented Article 2(11) from taking effect, in that upon the

ratification of the treaty there was no longer any "accepted rule of international law" or any treaty to the contrary which interfered with its operation.

I am driven to the conclusion that Constitutional authority for subjecting civilians accompanying the armed forces to court-martial discipline in time of peace, if such exists, must be found in Article 1, Section 8 of the Constitution, by one of the clauses of which section the power is bestowed on Congress "to make rules for the government and regulation of the land and naval forces," as supplemented by the "necessary and proper" clause.

Courts are slow to reject as unconstitutional a law which has been duly passed by Congress. Congressmen as well as Judges take an oath to support the Constitution of the United States. It is not probable that in any session of that body there should be a dearth of members who are themselves expert in the field of Constitutional law. It is not to be lightly supposed, therefore, that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power. True it is that if a law of Congress clearly transgresses some positive prohibition expressed in the Constitution it is the duty of a court to strike it down; but where, as here, the problem is merely to find authority for an act which is not forbidden by that instrument, we must proceed
34 more cautiously. In view of the "necessary and proper" clause, we must weigh in the scales in favor of the law's validity every circumstance which may be reasonably assumed to have influenced its enactment. As was said by Chief Justice Marshall in the celebrated case of *McCulloch* v. *Maryland*, 4 Wheat. 316 (U. S. 1819):

> "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . . Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Since the end of World War II segments of the armed forces of the United States have been stationed in many nations throughout the world. In the interest of keeping the morale of the troops on a high level, the government has encouraged the wives of soldiers to accompany them and live with them at their various posts, and has expended vast sums of money in transportation and maintenance charges for that purpose. It was said in argument and not disputed that there are now no fewer than a quarter of a million civilians of all descriptions accompanying the armed forces without the continental limits of the United States and the territories mentioned in Article 2(11) of the Code of Military Justice. In the existing circumstances, if these civilians are to be exempt from discipline by the military forces in the only available way,
35 namely, by court-martial procedure, a most serious situation is presented. They must then either be subject in all respects to the local laws of the countries where they are stationed, or else they are left free from all restraints whatsoever.

Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is "part" of the armed forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of these civilians accompanying the armed forces abroad is not necessarily and properly incident to the express power "to make rules for the government and regulation of the land and naval forces." Neither the *Toth* case nor any other expression by the Supreme Court compels such a conclusion. Therefore, I must uphold Article 2(11) of the Code of Military Justice in its entirety.

The writ of habeas corpus will be discharged.

BEN MOORE,
United States District Judge.

January 16, 1956.

36 In the United States District Court for the Southern District of West Virginia

Habeas Corpus No. 1726

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER, RELATOR,

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., RESPONDENT

ORDER DISCHARGING WRIT OF HABEAS CORPUS AND REMANDING TO CUSTODY—February 2, 1956

For the reasons stated in the opinion of this Court, filed on January 16, 1956, the writ of habeas corpus heretofore issued is discharged, and it is ordered that Mrs. Dorothy Krueger Smith be

46 PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7165

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER, RELATOR, APPELLANT,

versus

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, RESPONDENT, APPELLEE

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

DOCKET ENTRIES

February 21, 1956, record on appeal filed and appeal docketed.

February 23, 1956, Relator's Exhibit No. 1 and Respondent's Exhibits Nos. 1 and 2 received from the Clerk of the United States District Court for the Southern District of West Virginia, at Charleston.

47 ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF RECORD IN MAKING UP RECORD FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATION FOR WRIT OF CERTIORARI

Order for Reasons Appearing to the Court, It is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

FURTHER ORDERED that a copy of this order be incorporated in said certified transcripts of records. January 9th, 1941.

JOHN J. PARKER,
Senior Circuit Judge.

48 Clerk's Certificate to foregoing transcript omitted in printing.

remanded to the custody of the respondent, Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia.

BEN MOORE,
United States District Judge.

Dated: February 2, 1956.

Approved as to form:

FREDERICK BERNAYS WIENER,
Counsel for Relator.

[File endorsement omitted.]

37-44 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS—Filed February 6, 1956

Notice is hereby given that Walter Krueger (ex rel. United States of America), Relator above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order discharging the writ of habeas corpus heretofore issued in the above styled action and remanding Mrs. Dorothy Krueger Smith to the custody of the Respondent, Nina Kinsella, Warden of the Federal Reformatory for Women at Alderson, West Virginia, entered herein on February 2, 1956.

JOHN C. MORRISON,
Attorney for Relator,
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Charleston 24, West Virginia.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.
ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda, Maryland,
Of Counsel.

Dated February 3, 1956.

45 Clerk's Certificate to foregoing transcript omitted in printing.

49 ORDER APPOINTING COURT MARTIAL

Proceedings of a General Court-Martial which met (at) Tokyo, Japan, at 0905 hours, 5 January 1953, pursuant to the following orders:

HEADQUARTERS
HEADQUARTERS AND SERVICE COMMAND
FAR EAST COMMAND
8232D ARMY UNIT
APO 500

16 December 1952

SPECIAL ORDERS

NUMBER 203

EXTRACT

10. Pursuant to Section I, General Orders Number 51, Department of the Army, 19 May 1952, a general court-martial is hereby ordered to convene at Tokyo, Japan, at 0900 hours, on 16 December 1952, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. (Officers not members of this command detailed with the concurrence of CINCFE, APO 500). The court will be constituted as follows:

LAW OFFICE

COL	JOHN M PITZER	026378	JAGC	Korean Base Section, APO 59, certified in accordance with Article 26a
		MEMBERS		
MAJ GEN	JOSEPH P SULLIVAN	05328	USA	Hq AFFE, APO 343
BRIG GEN	GERSON K HEISS	015092	USA	Hq AFFE, APO 343
COL	ALOYSIUS J LEPPING	016853	Arty	Hq FEC, APO 500
COL	SAMUEL L METCALFE	09684	Inf	Hq FEC, APO 500
COL	LUSTER A VICKREY	017592	GS	Hq FEC, APO 500
COL	DAVID RADAM	051736	Inf	500th MI Svc Gp APO 500
LT COL	CHARLES M ACKLEY	039997	CE	64th Engr Base Tops Bn APO 500
LT COL	WILLIAM E FRAME	0220711	SigC	71st Svc Bn APO 500
LT COL	THOMAS L STEPHENS	0278119	CE	Japan Const Agency 7101st AU APO 500
LT COL	LILLIAN HARRIS	L96	GS	Hq AFFE, APO 343
MAJ	OLIVE E MILLS	L85	WAC	This Hq (JA Sec)
		COUNSEL		
LT COL	WILLIE H H JONES	039626	JAGC	Hq IX Corps, APO 264, Trial Counsel, certified in accordance with Article 27b
MAJ	EDWARD W HAUGHNEY	061964	JAGC	This Hq (JA Sec), Assistant Trial Counsel, certified in accordance with Article 27b
LT COL	HOWARD S LEVIE	038735	JAGC	Hq AFFE, APO 500 Defense Counsel, certified in accordance with Article 27b

50

MAJ	DUDLEY O RAE	0366573	Arty	This Hq (JA Sec), Assistant Defense Counsel, certified in accordance with Article 27b

BY COMMAND OF BRIGADIER GENERAL ROLFE:
THOMAS B EVANS
Colonel, GS
Chief of Staff

OFFICIAL:

D M PRESTON
LTCOL, AGC
Asst AG

Par 10 SO 203 Hq H&S Comd FEC 8232d AU APO 500, 16 Dec 52 (Contd)

51

Department of the Army
Office of the Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army, Before SILVERS, WOLF and CHALK, Members

CM 360857

May 26, 1953

HEADQUARTERS AND SERVICE COMMAND FAR EAST COMMAND

Sentence adjudged 10 January 1953. Approved sentence: Confinement for life.

UNITED STATES

v.

DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters Far East Command, APO 500

Appellate Counsel for the Accused: Brigadier General Adam Richmond, USA (Ret.) Lieutenant Colonel George M. Thorpe, JAGC, First Lieutenant John W. Fuhrman, JAGC.

Appellate Counsel for the United States: Colonel Allan R. Browne, JAGC, Lieutenant Colonel William R. Ward, JAGC, First Lieutenant Kenneth A. Howard, JAGC.

DECISION—May 26, 1953

The board of review has reviewed the record of trial in the above entitled case.

Summary of Proceedings

Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, the premeditated murder of her husband, Colonel Aubrey D. Smith, by means of stabbing him with a knife, at Tokyo, Japan, on or about 4 October 1952, in violation of the Uniform Code of Military Justice, Article 118. She was sentenced to be confined at hard labor for life. Evidence of no previous convictions was considered. The convening authority

52 approved the sentence, directed that pending completion of appellate review the accused be transferred to Sixth Army for confinement wherever facilities are available for female prisoners, and forwarded the record of trial to The Judge Advocate General of the Army for review by a board of review.

Statement of Facts

About mid-September 1952, the accused and her husband, Colonel Aubrey D. Smith (the deceased), a United States Army officer, were entertaining Rick Murphy, a 17 year old friend of their son, in the living room of their officially assigned quarters in "Washington Heights," a United States Army dependent housing area in Tokyo, Japan. When Colonel Smith made a remark, "which seemed quite sarcastic," to the accused concerning "some medicine or pills or something" as she was leaving the room, the accused said to him, "'Some day I am going to kill you.'" She repeated the remark a second time. Aside from this interchange, the conversation had been "friendly" (R. 15, 18-23, 33-37; Pros Exs 1, 2).

On the morning of 3 October 1952, the accused informed Shigeko Tani, a domestic servant employed by the Smith family, that the family which included the accused, her husband, their 15 year old daughter, and 17 year old son, was to return to the United States in the near future. When the accused was driven by Mrs. Joseph S. Hardin to the dispensary, commissary and post exchange later that morning, or shortly after 0900 hours, the accused appeared happy about returning to the United States, but she also seemed "a little upset" and not too coherent in actions and speech. At the dispensary where she saw a medical officer (Captain Clifford W. Draper) and obtained paraldehyde, an obnoxious smelling sedative, she told Mrs. Hardin that she felt like killing herself but lacked the means of doing so. At the commissary, Mrs. Hardin had to assist her in walking and making purchases; and the accused became angry at a clerk over meat purchases and a man who inadvertently almost closed a door on her. Mrs. Hardin again assisted her inside her (the accused's) home upon returning there at about 1200 hours where she (the accused) soon afterwards repaired to a second floor bedroom, containing twin beds, which she shared with her husband. When Tani answered a telephone call from Colonel Smith at about 1500 hours, her attempts to awaken the accused were to no avail; however, she was awake and talked "normal" later on when Tani took her some ice water and again returned to the bedroom to wipe up a "whiskey and water" the accused had dropped on the floor. Colonel Smith arrived home at about 1730 hours, had several "drinks" before dinner, and then had dinner with his son. The accused ate no food and remained upstairs throughout the entire evening. Colonel Smith returned from a walk about 2120 hours, had a "drink," and then went upstairs. From that time until Tani retired to her bedroom, also located on the second floor, at about 2140 hours, Tani entered the Smith bedroom on one occasion to take the accused some ice water and half an orange, and on another occasion when the accused appeared "half asleep" on her bed. Neither of the

52

Smith children was home then or later (R. 38-53, 76-80, 243-259; Pros Ex 5).

Tani fell asleep at about 2200 hours. Afterwards, at some time undetermined by her, she was awakened when Colonel Smith called, "'Tani, Tani'" in a loud voice. She got up "very soon," put on her robe and slippers, and "ran" into the Smith bedroom where she found the colonel lying on his bed with blood "under [him]." The accused was at a position between the two beds. On his bed was an "Okinawa knife" with an eight inch blade which she (Tani) later concealed in the living room. The knife was one which she had located for and given to the accused on 1 October 1952 and which the accused was observed by two Japanese workmen to still be in possession of on the following day. The colonel was pale, appeared to be in pain, and had a bleeding wound on his right side in the vicinity of his lower ribs against which Tani placed a towel. He told Tani in the accused's presence that the accused had stabbed him. The accused, at various times while Tani was present thereafter, said, "'I'm so glad I did it. * * * You better go to a Japanese hospital. * * * What were you doing when I was in the hospital?'" After Tani had unsuccessfully attempted to telephone Lieutenant Colonel Joseph S. Hardin, a neighbor, for assistance, she ran to the Hardin quarters nearby and knocked on the door, again without success. Upon returning to the Smith quarters and the aforementioned bedroom, she saw the accused between the two beds with a "kitchen knife" about six inches long in her right hand pointed downward toward Colonel Smith who in turn was holding the accused's right wrist. Tani relieved the accused of the knife which was "clean" and returned it to the kitchen "which is the usual place for the knives to be kept." A second telephone call to the Hardin quarters by Tani who then handed the telephone to Colonel Smith resulted in the arrival of Colonel Hardin, his wife, and Lieutenant Colonel Melvin A. Goers (R. 53-69, 74, 80-95, 236-242; Pros Ex 4; App Ex 2).

54 Colonel Hardin testified that the second telephone call aforementioned which occurred at about five or ten minutes after midnight was answered by his wife. Previous to the said call, he had heard a knock at the door of his quarters at about 2400 hours to which he did not respond because he thought the person who knocked had departed by the time he (Colonel Hardin) got to a window overlooking the door. He had not heard the telephone ring on any other occasion about this time. When he and Colonel Goers entered the Smith bedroom, he saw Colonel Smith on his bed, observed his wound and the blood "all under him," but saw no evidence in the room of any struggle. He thought the accused was "highly intoxicated" because her actions were not coordinated, her speech was incoherent, and she did not appear rational. However, she appeared to recognize him because she called him by his first

name. He heard her say, "'It is too bad I did not get him in the heart.'" Colonel Goers, on the contrary, thought the accused was rational because she did not stagger, having only stumbled "a little or lurched" when she walked; however, she appeared "a bit dazed" and said, "'No one will ever know the reason why.'" To Colonel Goers, her remark appeared to have been "clearly spoken." Soon afterwards, she "seemed to have passed out" or was in a "deep sleep or in a deep coma" on her bed, after having attempted to light two cigarettes at the same time. Colonel Smith, before departing for the hospital, desired to put on some underwear, was assisted in doing so, and insisted on walking and did walk to the head of the stairway where a lifter was placed. When Colonel Hardin wanted to cover him with one of his (Colonel Smith's) own blankets for the ride to the hospital, Colonel Smith gave Colonel Hardin "a hard time." During the ambulance ride to the hospital, Colonel Smith was "very much interested in how long it was going to take to get [there]." Major Walter J. Burns, a military police officer, arrived at the Smith's quarters at about 0100 hours as Colonel Smith, accompanied by Colonel Hardin, departed for the hospital. The "Okinawa knife" which Tani handed Major Burns had blood on the blade and hilt which was later determined to be human blood of the same type as that of Colonel Smith. When Major Burns entered the bedroom, the accused appeared unconscious rather than asleep; and she did not awaken when he carried her to an ambulance which arrived after the departure of the other ambulance. Colonel Smith's bed was "flooded with blood" and there were two spots of blood on the accused's bed which appeared to have been wiped there "by a hand or some part of the body." The "repulsive * * * sickening" odor of paraldehyde was present in the room and there was an empty medicine bottle which had *previously* that day contained two ounces of paraldehyde on a table between the two beds. A duty agent of the "Tokyo Field Office of the CID" arrived at the Smith quarters before 0200 hours and started an official investigation of the incident (R 96-150, 163-166, 265-266; Pros Exs 4, 5, 6, 7, 8, 9; Def Exs B, C).

Colonel Smith was brought into the emergency room of the Tokyo Army Hospital at about 0138 hours, where First Lieutenant Paul R. Rosenbluth, a medical officer, was on duty. The colonel was immediately examined, emergency measures were taken to counteract shock, and glucose was administered intravenously within "a matter of minutes" after his arrival. Later he was given blood transfusions. Because surgery was indicated, Captain William C. Dowling, Chief of the General Surgical Section of the hospital, was called at his home and arrived at the hospital at about 0215 hours. Although Colonel Smith was rational, his condition of shock and low blood pressure were so precarious as to prevent moving him

from the emergency room until about 0400 hours, at which time he was removed to a surgical ward. At about 0530 hours, he began to respond "minimally" and surgery appeared possible within an hour. However, his condition changed for the worse and he expired at 0600 hours in a surgical room to which he had been rushed. His wound, the cause of his death, was described as a "transection of right rental vein, partial transection of right kidney and puncture wound of the inferior vena cava." It could have been inflicted by a knife thrust. The medical officers in attendance were of the opinion that Colonel Smith received "extremely prompt * * * and timely" and proper medical care at the hospital, although Colonel Hardin did not share their opinion. During the time he remained with Colonel Smith at the hospital, Colonel Hardin was "emotionally upset" (R 31-33, 107-108, 151-162, 204-214; Pros Exs 3, 4, 5).

The accused was first taken to a dispensary and then to the Tokyo Army Hospital, arriving at the latter place at about 0250 hours. During the ride in the ambulance, she appeared to be sleeping. At the hospital, she was awake when examined by a medical officer who was of the opinion she was oriented and rational because her speech, although appearing a "little thick," was clear and understandable, she knew who she was and where she was; and she indicated a familiarity with the prior events of the evening. Although she had the odor of paraldehyde on her breath, the ingestion of that substance did not affect her general reaction to questioning. She had about six bruises on her body which could have been caused by falling down some stairs "a day or two before."

56 She was admitted to a guarded prison ward of the hospital at about 0330 hours where two nurses were variously in her presence until she fell asleep at about 0430 hours. Although her comments were unsolicited by the nurses, she talked "from the minute" she arrived on the ward. After stating her name, she said that she had stabbed her husband with "a ten inch Japanese knife" while he was asleep; that she had waited for him to go to sleep for that purpose; that he was sending her "home" because she had been a detriment to his career and prevented him from being promoted; that when informed by him that they were "going home," she told him that if she had to go alone, she would kill him first and then kill herself; that he was being "shanghaied" from his "position" because of her actions and behavior; and that she was glad she had stabbed him but she was "gall[ed]" that she had not stabbed him "on the other side." Both nurses were of the opinion that she was ill because she was variously emotional, hysterical, grief-stricken and witty, going "from one extreme to the other." She frequently asked about her husband's condition and repeated the above statements again and again. Before falling asleep, she asked one of the nurses for a cigarette and the nurse, having none at the time, promised her some when she awakened. When given

some cigarettes upon awakening at 0630 hours, she said to the nurse, "'You keep your word.'" She still had the odor of paraldehyde on her breath when she arrived at the ward and she admitted having previously ingested that substance as well as seconal, a barbiturate and sedative (R 124, 167-197, 267).

Captain James A. Reilly, Medical Corps, a neurologist, conducted an electroencephalogram on the accused on 20 October 1952 and a neurological examination of her on 28 October 1952. There was no evidence of any organic disease of her brain or central or peripheral nervous system, of brain tumor, or of "large mass focal accumulation of dead cells in the brain or spinal cord" (R 197-204).

Lieutenant Colonel Arthur L. Hessin, Medical Corps, Chief of the Neuropsychiatric Service, United States Army Hospital, 8167th Army Unit, and Captain Reilly, aforementioned, together with Major Henry A. Segal, Medical Corps, and Captain William E. Mayer, Medical Corps, all psychiatrists except Captain Reilly, were appointed on 5 November 1952 to a board to determine the sanity of the accused. Her previous medical records from both the Far East Command and the United States, the earliest record dating back to about October 1946, the "military police Criminal Investigation Division reports," and an earlier "Social Service history" obtained from "the deceased" were made available to the
57 members thereof. None of the medical records, with the exception of one, contained a psychiatric diagnosis which described the accused as psychotic, although some of them described her as having behavior disorders, being addicted to sedatives, directing violence toward others, having suicidal tendencies, and displaying other evidence of a violent and apparently uncontrollable temper. These characteristics are considered to be character and behavior disorders, not a mental defect, disease, or derangement. One past record contained a diagnosis of "anxiety reaction" which would be classified as a mental disease. The board unanimously diagnosed the accused's condition as follows:

> "'1. Emotional instability reaction, chronic severe, manifested by extreme emotional outbursts and suicidal and homicidal manifestations. Predisposition severe (numerous previous hospitalizations for similar disorder); stress, minimal (recent arrival in the Far East Command); incapacity, minimal. 2. Intoxication, drug, barbiturate and paraldehyde (terminated 4 October 1952). 3. Addiction, drug, (barbiturate). * * *.'"

and concluded

> "'a. The accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong. b. The accused at the time of the alleged offense

was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right. c. The accused does possess sufficient mental capacity to understand the nature of the proceedings against her and intelligently to conduct or cooperate in her defense."

Embodied in the diagnosis of the board is the conclusion that she was not suffering from a mental defect, disease or derangement. The said diagnosis pertains to personality traits and behavior characteristics which are not forms of insanity (R 214-233; Def Exs D-P, incl).

From 30 April 1952 to 15 May 1952, the accused was hospitalized at the United States Army Hospital, 8167th Army Unit, Tokyo, Japan, and was there under the professional care of Colonel Hessin, aforementioned. When admitted, she was in an intoxicated
58 condition and had a lacerated left forearm, the result of a thrust of her fist through a window. Her condition, which was diagnosed as "simple drunkenness" and "emotional instability reaction," was considered to be "one of management." It was intended at that time that she be evacuated to the United States to avoid possible further demonstrations of "emotional instability" which might "prove to be embarrasing and even threatening" to herself and others; however, evacuation was not effected because of her husband's "plea" for one more chance. The couple was given to understand that the "next hospitalization" would be for the purpose of medical evacuation (R 216, 224-225).

Tani stated that from May to September 1952, the accused did not drink alcoholic beverages and the "home life" of the Smith family appeared "normal * * *" [and] happy." However, during and after September 1952, the accused "began to drink again." While drinking, she did not appear to know what she was doing and her speech was difficult to understand. She kept medicine bottles "around the house in various places," some of which her husband and children frequently concealed from her. (After the event of 3-4 October 1952, a number of capsules were found in a second floor closet in a box containing Christmas cards and envelopes. One of these capsules, upon chemical analysis, was found to contain seconal.) On 2 October 1952, the accused, on four or five occasions, fell down some stairs located near the second floor bathroom of her quarters. Tani never saw Colonel Smith abuse his wife. Mrs. Hardin also noticed a change in the accused during and after September 1952. The accused was frequently "upset" and nervous; she cried "a lot"; and she complained of going through menopause (R 113-114, 256-258, 278; Def Ex B).

Having been advised of her rights as a witness, the accused elected to remain silent (R 344).

Captain Clifford W. Draper, Medical Corps, assigned to a dis-

pensary in the accused's housing area, a defense witness, saw the accused as a patient on seven occasions between 18 August 1952 and 29 September 1952. She first complained of menstrual abnormality, for which he gave her a hormone; and she next complained of inability to sleep, and "extreme" restlessness and nervousness, for which he gave her another hormone and phenobarbital (barbiturate), dexedrine and seconal (barbiturate). Thereafter, she had the same complaints as well as stating that she experienced crying spells, for which he variously gave her a variety of
59 medicants including hormones, testosterone, phenobarbital, dexedrine, vitamins and sodium amytal (barbiturate). Specific directions as to dosage were given on each occasion. On the latter date aforementioned (29 September 1952) her condition, although previously somewhat improved, was the same as when he first saw her. She was "extremely agitated" and he suggested immediate hospitalization for psychiatric treatment. She became "more agitated," "broke down and wept" at this suggestion, and "practically pleaded" with him to continue treatment and not hospitalize her, stating as an excuse that she could not leave her family and home at that time. She was not hospitalized and he gave her paraldehyde with proper dosage instructions. He next saw her on 3 October 1952 (when Mrs. Hardin took her to the dispensary) and she "broke down" in his office and cried. She told him of the family's return to the United States, that she was confused by being depressed despite the good news and the possible promotion of her husband to the rank of "general," and that "she thought she must be going crazy." However, he believed that she was coherent "to a certain extent." She asked him for a different sedative because the odor of paraldehyde was offensive to her husband, but he gave her two ounces more of paraldehyde because the barbiturates were habit forming and she was taking "quite a bit of them." He explained to her the reason for continuing the administration of paraldehyde. On that day, he was of the opinion that she needed immediate hospitalization; and he called Colonel Smith and informed him of that fact (R 260-275; Def Ex C).

Medical records of installations in the United States pertaining to the accused show that she received psychiatric treatment, both as an inpatient and outpatient, as early as November-December 1947. The diagnosis at that time, as well as those of other periods thereafter, was as follows:

Date	*Diagnosis*
November-December 1947	Emotional instability reaction, immaturity reaction, not psychotic
July-September 1949	Anxiety state, severe, improved
August 1950	Anxiety reaction

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January 1951	Anxiety reaction
February-March 1951	Emotional instability reaction
May-June 1951	Emotional instability reaction

These medical reports variously indicated chronic alcoholism, addiction to barbiturates, specifically seconal, and wounds self-inflicted during suicidal attempts (R 226-232; Def. Exs D-P, incl).

A blood alcohol test performed on the accused at 0300 hours, 4 October 1952, showed a positive reaction of 0.5 milligrams per cubic centimeter which could have been caused by the ingestion of paraldehyde rather than alcohol. Paraldehyde is a depressant which usually induces sleep. Seconal, a barbiturate, is likewise a depressant which usually induces sleep (R 275-287).

Brigadier General Rawley E. Chambers, Medical Corps, Chief of the Division of Psychiatry and Neurology in the Office of The Surgeon General, Department of the Army, also a defense witness, testified that he saw the accused as a patient on numerous occasions between October 1948 and the approximate date of her departure for the Far East Command. From the beginning, "it became apparent we were dealing with a person who was very unstable and uneasy; who had many anxieties; and who definitely was in need of psychiatric treatment." She was insecure, and felt inadequate, unable to cope with ordinary routine responsibilities, and rejected by her family and friends alike. She thus became incapable of controlling her emotions with the result that she became "hostile" and subject to "explosive" or "terrific • • • emotional outbreaks" which usually required physical restraint. She began to fear insanity and desired reassurance that she was not insane. Thereafter, "somewhere along the line," she started using sedatives such as seconal, nembutal, and "various barbiturates," some of which were regularly prescribed with proper dosage directions which she ignored, to quiet her when she was "upset." When she took an overdosage of these sedatives or drugs which produced "toxic psychosis" of short duration, "her speech became slurred and thick and slow; she became staggering in her gait; her speech at times would be responsive to questions but thick; she would make any wild statement apparently 'out of the blue'; she would repeat them over and over and eventually as the full effect of the
61 drug would become felt, she would go to sleep." However, for a two or three hour period before going into a "deep sleep, the controls which she had rigidly exercised up until this time were loosened but even then it was usually a period of time when increasing tensions mounted and suddenly the thing exploded." When she had no sedatives, she resorted to alcohol, over-

indulgence in which, on one occasion when hospitalized therefor, resulted in giving her an "antabuse treatment." At times during her intoxication, drug or otherwise, she had to be physically restrained from injuring herself or others. On one occasion, she cut her wrists and elbows; on another, she jumped over a second story banister. After one of the "outbreaks," he (General Chambers) diagnosed her case as "emotional instability reaction with barbiturate addiction"; but he then believed, without so stating or writing, and now believes that she suffered from a mental disease, defect or derangement. However, in the terms of the manual, *Psychiatry In Military Law*, TM 8-240, September 1950, her episodes "over a period of many months," including the one for which on trial, are character and behavior disorders. Nevertheless, at the moment of the stabbing of Colonel Smith, assuming drug intoxication at the time, she was subject to an "irresistible impulse." He concurred in general with the board's conclusions and diagnosis, heretofore set forth, except that he believed she was unable to adhere to the right at the time of the commission of the offense (R 287-343; Def Exs R, S).

In rebuttal, Maj Segal, a member of the sanity board, aforementioned, stated that he first saw and examined the accused at about 0805 hours on 4 October 1952. She was oriented as to time, place and person; and there was no evidence of unusual mood, auditory hallucinations and delusions. Her speech was "slightly blurred" but her answers were relevant and to the point. However, "[she] appeared to be nervous, upset; some tremor of the hands and a mild depression was in evidence." She appeared aware of the events of the previous night. When he later that morning informed her of her husband's death, she became "agitated," paced the floor and "exhibited considerable depression and agitation." He subsequently saw her at the formal hearing of the sanity board and at other "infrequent intervals" in his official capacity. He did not believe that the accused was acting under an "irresistible impulse" when she stabbed Colonel Smith because she had no mental disease, defect or derangement. "Toxic psychosis" due to drugs or alcohol is "almost invariably" accompanied by disorientation, confusion, hallucinations, delusions and amnesia. From his examination of her and her former medical records, these conditions were not evident. Moreover, her blood alcohol determination, which could have been caused by the ingestion of paraldehyde rather than alcohol, is not considered as evidence of "marked drunkenness or intoxication," according "to expert authorities in the field". (R 345-354).

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Discussion

The accused was found guilty of the premeditated murder of her husband, Colonel Aubrey D. Smith, by means of stabbing him

with a knife at the time and place alleged, in violation of the Uniform Code of Military Justice, Article 118. Prior to a determination of the sufficiency of the evidence to establish the guilt of the accused beyond a reasonable doubt, we will consider certain matters raised by the appellate defense counsel and the record of trial.

a. *Jurisdiction.*

Before the accused pleaded, the trial defense counsel made a motion to dismiss the charge and specification on the ground that the court-martial lacked jurisdiction to try the accused. The motion was denied (R 9-28; Ct Exs 1, 2, 3, 4; App Ex I). Two theories were advanced in support of the motion: one, that upon the death of her husband, the accused was no longer a person "accompanying" the armed forces of the United States within the purview of Article 2, subsection (11) of the Code; and two, that if the contrary be assumed, the court-martial lacked the authority to exercise its jurisdiction in view of the Executive Agreement between the United States and Japan entitled, *Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan*, in effect before and during all times pertinent to the issue. The appellate defense counsel adopted trial defense counsel's argument and supporting data in assigning error.

Considering these two theories separately in the order they appear above, trial defense counsel, as to the former, asserted in substance that the death of the accused's husband terminated jurisdiction of Army courts-martial over her. It was further asserted by same counsel that previously decided cases, each involving a civilian employee of the Army whose employment in an area without the territorial jurisdiction of the United States had been terminated, which held that a change in employment status did not affect the jurisdiction of the court-martial, were inapplicable here because those cases arose either in a theater of operations during time of war or in an occupied territory (citing In re Di-
63 Bartoli, 50 Fed. Supp. 929 (D.C. N.Y. 1943); Perlstein v. United States, 151 F. 2d 167 (3d Cir. 1945); cert. dismissed 328 U.S. 822; Grewe v. France, 75 Fed. Supp. 433 (D.C. Wisc. 1948)).

A better understanding of the point raised is had by a consideration of the article and subsection referred to by counsel (UCMJ, Art. 2, subsec. (11)), and a related subsection of the same article, subsection (10). Subsection (11) provides that the following persons are subject to the Uniform Code of Military Justice:

> "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed

by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico and the Virgin Islands;"

Subsection (10) similarly provides that the following persons are subject to the Uniform Code of Military Justice:

"In time of war, all persons serving with or accompanying an armed force in the field;"

Whether an armed force is "in the field" within the meaning of subsection (10) is not to be determined by the locality in which it may be found, but rather by the activity in which it may be engaged at any particular time (Hines v. Mikell, 259 Fed. 28, 34 (4th Cir. 1919); MCM, 1951, App. 2, p. 413, fn). Thus forces assembled in temporary cantonments in the United States for the purpose of training preparatory for service in the actual theater of war were held to be "in the field" (Hines v. Mikell, supra, at p. 35). Likewise, a merchant ship and crew engaged in transporting troops and supplies to a battle zone were held to constitute a military expedition "in the field" (McCune v. Kilpatrick et al, 53 Fed. Supp. 80, 84 (D.C. Va. 1943); In Re Berue, 54 Fed. Supp. 252, 255 (D.C. Ohio 1944); MCM, 1951, supra) It is apparent from a reading of these two subsections of Article 2 of the
64 Code that a state of war extends courts-martial jurisdiction, in certain limited cases, over persons serving with or accompanying the armed forces to a locality within, as well as without, the continental limits of the United States and its territories.

The wife of a member of the armed forces of the United States who accompanies her husband to, or joins him at, his duty station in a foreign country is a person "accompanying" the armed forces of the United States within the meaning of Article 2, subsection (11), of the Code (see Madsen v. Kinsella, Warden, 343 U.S. 341, 361, and fn. 18, 28 (1952)). There being no doubt therefore that the accused in the instant case enjoyed such status while in Japan prior to her husband's death, whether such status continued after his death is, we believe, vitally linked to the following facts established either by the record or through the proper exercise of judicial notice:

(1) The accused entered Japan upon the invitation of the United States Army, and necessarily with the permission of the Japanese government, solely because of her marital status to a United States Army officer stationed there and to the exclusion of any other status (see Executive Agreement, supra, Art. IX, subsecs. 1 and 2, infra).

(2) The United States Army was responsible for and accomplished her movement to Japan and her logistical and medical support throughout her stay there.

(3) The United States Army was responsible for removing her from Japan coincident with, or within a reasonable time after, the termination of her right to remain there, as in the usual case when the husband member of the armed forces of the United States is permanently transferred away from Japan, or in the case when he dies (see Executive Agreement, supra, Art. IX, subsec. 5, infra).

(4) The accused, after the commission of the offense alleged, "was not allowed to merge with the civilian population" (United States v. Schultz (No. 394), 4 CMR 104, 110), and, in fact, was never released from the physical custody exercised over her by the United States Army before her husband died.

65 We adopt the view that her status as a spouse or dependent ceased to exist upon her husband's death; but in our opinion, based upon, but not limited to, the four facts listed above, she remained a person "accompanying" the armed forces of the United States within the meaning of the Code and subject to the jurisdiction thereof for all purposes herein considered. We find convincing authority for our conclusion in the cases cited by the defense, which hold the true test to be whether the person, when tried, is still accompanying the armed forces of the United States in the area specified regardless of a prior change in status, and not necessarily whether trial occurred in a theater of operations during time of war or in an occupied territory. Were the contrary true, as asserted by the defense, jurisdiction in those cases would have been predicated on Article of War 12, rather than Article of War 2 (see United States v. Schultz, supra, at pp. 111-116). Two of these cases involved offenses committed after the termination of employment and the third involved an offense committed before termination of employment with trial occurring after such termination.

In the *Greve* case, *supra*, cited by the defense, tried under the *Manual for Courts-Martial, U. S. Army, 1928*, the Articles of War then containing provisions almost identical to those presently considered, and certainly connoting the same meaning, employment had been terminated between the time the offense was committed and the date of the trial. In reference to the defense's argument there that "the shooting war" in Germany was over, that the American forces were no longer engaged in military operations, and that the accused, therefore, could no longer be considered as accompanying the Army "in the field," the district court, at page 435, stated:

> "Petitioner's argument ignores the other provision of Article [of War] 2(d), to wit: '* * * all persons accompanying

or serving with the Armies of the United States without the territorial jurisdiction of the United States, * * *.' "

It was held, at page 436, that Grewe came under the above classification as well as that concerning a person serving with or accompanying an armed force "in the field" during time of war; that even though his employment may have terminated, he was nevertheless subject to courts-martial jurisdiction because he was in Germany on a military permit and only with the consent
66 of the theater commander, he was not free to come and go as he pleased, and he was not allowed to merge with the population of Germany; and that although he was " 'serving with' " the Army at the time he committed the offense, he was "at least 'accompanying' the Army" at the time of his court-martial.

The other cases cited by the defense, aforementioned, hold in theory, if not in fact, much the same as the *Grewe* case so as to render specific discussion thereof pointless. However, one significant statement by the circuit court in the *Perlstein* case, *supra*, wherein it was determined Perlstein was still "accompanying" the Army despite the prior termination of his employment, which bears repeating here, is:

> "Under the specific language of Article 2(d) of the Articles of War it is not Perlstein's employment status but whether he was still 'accompanying' the Army at the time the offenses were committed, that furnishes the test of the court-martial's jurisdiction over him."

We perceive no distinction between termination of employment and termination of marital status by reason of the death of a spouse in the military service. Having already concluded that the accused in the instant case was still "accompanying" the Army within the purview of the article in question, it follows that the court-martial had jurisdiction over her and the offense.

The second theory of the defense is that the court-martial, if it had jurisdiction over the accused and the offense, lacked the authority to exercise it because of the Executive Agreement, *supra*, between the governments of the United States and Japan. This poses for the first time to appellate bodies within the military judicial framework a question of interpretation of the said Agreement. As a guide-post, we rely upon a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties (Valentine v. United States ex rel Neidecker, 299 U. S. 5, 10 (1936)). The provisions of this Agreement which we believe are germane to the intent of the signatories are as follows:

* * *

67 "ARTICLE XVII

"2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component and their dependents, * * *. Such jurisdiction may in any case be waived by the United States.

"3. * * *

(f) The United States armed forces shall have the exclusive right of removing from Japan members of the United States armed forces, the civilian component, and their dependents. The United States will give sympathetic consideration to a request by the Government of Japan for the removal of any such person for good cause.

* * *

"4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents, may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by the United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under
68 this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction. * * *"

"ARTICLE I

"In this Agreement the expression—

* * *

(b) 'civilian component' means the civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan * * *

(c) 'dependents' means

(1) Spouse * * *

* * *"

"ARTICLE IX

"1. The United States shall have the right to bring into Japan for purposes of this Agreement persons who are members of the United States armed forces, the civilian component, and their dependents.

"2. * * * Members of the United States armed forces, the civilian component, and their dependents, shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

"* * *

"5. If the status of any person brought into Japan under paragraph 1 of this Article is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall,
69 if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Japanese Government."

The definition of "civilian component" in the Agreement, which is strikingly similar to a portion of the language employed in Article 2, subsection (11), of the Uniform Code of Military Justice, clearly shows that the wife of a member of the armed forces of the United States is a member of the "civilian component" as well as a "dependent." Although her status as a "dependent," by strict interpretation of the Agreement, ceases to exist upon her husband's death, as we have so held in this case, there is nothing in the Agreement which remotely suggests an intention to consider that her dual status as a person "accompanying the United States armed forces in Japan" likewise ceases to exist. In fact, the opposite intention is readily apparent in view of the provisions of the Agreement which relate to the responsibility of the United States authorities for removing such persons from Japan, and for the investigation and trial of such persons upon their commission of offenses there, and the facts that such persons enjoy a unique status and do not acquire any right to permanent residence or domicile in the territories of Japan. We arrive, therefore, at the inescapable conclusions that the court-martial, in the instant case, had the authority to exercise its jurisdiction over the accused and the offense and that the Executive Agreement conferred to it (the court-martial), a waiver being absent, the exclusive right to do so.

b. *Sanity.*

The accused's mental condition, as relates to criminal responsibility at the time of the commission of the offense alleged, became a predominant issue at the trial and on appeal before this board. The only point of disagreement between Brigadier General Rawley E. Chambers, the defense expert witness, on the one hand, and the prosecution's evidence and expert witnesses, on the other hand, was whether the accused was able to adhere to the right at the time she allegedly stabbed her husband. The court, implicit in its findings, resolved the issue of fact against the accused.

From our independent evaluation of all the evidence, it appears to us that the accused, for a considerable period prior to her
70 alleged act, displayed a high degree of emotional instability, otherwise considered a character and behavior disorder, or, in the language of the *Manual for Courts-Martial, United States, 1951*, a "defect of character, will power, or behavior * * *." The defense expert witness appears to agree with the prosecution's evidence and witnesses that the accused displayed evidence of such condition at the time with which we are concerned. This condition does not affect the criminal responsibility of an accused and constitutes no defense before a court-martial unless the accused, at the moment of the act, is unable to adhere to the right as a result of mental defect, disease or derangement (see MCM, 1951, subpar. 120b, p.200).

General Chambers stated his belief that an "irresistible impulse" existent at the moment the accused allegedly stabbed her husband rendered her unable to adhere to the right and that this was the basis for his opinion that she was then suffering from a mental defect, disease or derangement. He also indicated his belief that, although he had no basis in fact therefor, a condition of "toxic psychosis" of short duration as a result of drug ingestion may have been likewise existent at the crucial moment and would also have the effect of relieving the accused from criminal responsibility. Both of the prosecution expert witnesses on the question, however, expressed their belief to the contrary and that the accused was fully accountable in the criminal sense for her alleged act. A previous board of four medical officers, of which both of the said prosecution expert witnesses were members, unanimously reached the same conclusions. One of the said expert witnesses for the prosecution expressly stated his further opinion that the accused was not motivated by an "irresistible impulse" and that there was no evidence of "toxic psychosis" from his examination of the accused or her past medical records. A blood alcohol test performed on the accused about three hours after the incident which revealed a positive reaction of 0.5 milligrams per cubic centimeter is not considered as evidence of "marked drunkenness or intoxication."

The conflicting opinions substantially set forth above make it desirable to set forth here certain excerpts on the "irresistible impulse" doctrine from TM 8-240, *Psychiatry in Military Law*, a manual which, together with other authorities on the subject not here set out, we may use as a guide on this question and to which the various witnesses referred. Section II, paragraphs 5*a* and 5*b*, at pages 4 and 5, thereof, provide:

71 "*a*. If the accused knows that the act is wrong, yet cannot 'adhere to the right' because of some mental disorder, he is *not* mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or of volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of irresistible impulse. It should be applied in any given case for cogent reasons only, and with great discretion, since it lends itself readily to abuse. Any accused can say that, when he committed the assault, theft or murder, something made him do it, and that he could not restrain himself. The medical officer will view such claim with extreme caution, in view of its dangerous potentialities. The 'adhere to the right' or 'irresistible impulse' doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually, the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetuated because of those sick minds. In general, only two kinds of mental illness can be considered—compulsive psychoneuroses and psychoses. A psychoneurosis is a chronic disease; it is a way of life. The medical officer will be properly skeptical of an allegedly irresistible impulse that was, for the first time in the subject's life, suddenly generated just before the commission of the crime. Before testifying that an accused did the act because of an irresistible compulsion, the medical officer should be satisfied first, that the act is part of a repeated psychoneurotic pattern; second, that the patient exhibited mounting anxiety or tension which was relieved by the theft, arson (or whatever the compulsion was); and third, that the compulsion generated by the illness was so strong that the act would have been committed even though a policeman had been at the accused's side at the time the opportunity to commit the offense presented itself. It is evident that only very rarely, if indeed ever, do offenses committed within the
72 framework of a supposed compulsive psychoneurosis satisfy all three criteria, particularly the third. In con-

sequence, for practical purposes, true irresistible impulse, or 'inability to adhere to the right' occurs only in psychotics. Since its legitimate applicability is extremely limited, the doctrine of irresistible impulse will be seldom invoked.

"*b.* Irresistible impulses in psychotics usually come about in connection with commanding voices, persuasive visions, or overwhelming delusions which, by their nature and within the frame of reference of the psychosis, compel the patient to commit the act."

When we consider the medical evidence in relation to the "irresistible impulse" doctrine, together with the evidence relating to the accused's statements about her act, her actions before and after the incident, her prior threat to kill her husband, and her procurement and attempted use of a second knife after the maid Tani had relieved her of the fatal weapon and had left to summon aid, we arrive at the conclusions that the accused, beyond a reasonable doubt, was so far free from mental defect, disease or derangement at any time pertinent to the issue as to be able concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. Moreover, it appears to us that defense's own evidence fails to meet the burden of supporting its claim to the contrary. Apposite to the problem here is the language of the court in *Holloway v. United States*, 148 F. 2d 665, at page 667 (U. S. C. A. D. C. 1945) that:

"The institution which applies our inherited ideas or moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers to us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court."

73 Obviously, from the conclusions we have heretofore reached, we are unable to disagree with the court's apparent determination of the sanity issue under the guidance of instructions which we consider correct.

Related to the sanity issue is appellate defense counsel's assertion that the law officer committed reversible error in failing to instruct the court that physiological, psychiatric and emotional derangements, idiosyncracies and aberrations of the accused, not amounting to legal insanity, may be considered as bearing upon the mental

ability of the accused to premeditate and form a specific intent to kill. We are unable to find a request in the record for such an instruction; however, the fact that a request may have been made and refused is not determinative of the issue. The general rule which we prefer to follow appears to be stated in *Fisher* v. *United States*, 149 F. 2d 28, at page 29 (U. S. C. A. D. C. 1945), a case involving refusal below of a similar instruction, as follows:

> "The instruction confuses the issue of insanity with the question whether the psychopathic characteristics of the appellant prevented him from forming the deliberate intent necessary to constitute first degree murder. For that reason alone it was properly refused. * * * To give an instruction like [the one requested] is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes."

It follows that we consider the assignment to be without substantial merit. We also consider other assignments of error in connection with the law officer's refusal to give certain requested instructions relating to the sanity issue meritless because they were either generally covered in the instructions given or incorrect; however, we deem it inappropriate to belabor such assignments to any greater extent.

We have given careful consideration to appellate defense counsel's motion that we request a new psychiatric evaluation by a board of medical officers. The record shows that a thorough mental evaluation of the accused was made prior to trial by competent and experienced medical officers, some of whom testified at length at the trial. The members of the court-martial saw and heard all the witnesses, and had an opportunity to observe the accused.
74 The conclusions of the experts as to mental responsibility of the accused and the findings of the court-martial appear to have been arrived at after the most careful and painstaking inquiry. In view of all these considerations we can only conclude that further psychiatric examination would serve no useful purpose in disposing of the issues determined herein. The motion is therefore denied.

Appellate defense counsel also asserts that the adherence of the prosecution's medical witnesses to the "opinions * * * expressed in TM 8-240" deprived the accused of a trial based "on untrammelled, unrestricted and disinterested testimony." It is contended that the "arbitrary action of the Department of the Army in issuing such a publication and the unwarranted adoption of the same by the prosecution's witnesses * * * trenched upon those fundamental notions of fair play and justice so essential to due process of law." It is also asserted that the said manual was improperly used in the

impeachment of General Chamber's testimony. Counsel points out that by asking the witness to read portions of the manual aloud, incompetent evidence was placed before the court.

Consideration of these two assignments of error requires an understanding of the function and effect of Department of the Army Technical Manual 8-240, *Psychiatry in Military Law*, September 1950. The technical manual was "published for the information and guidance of all concerned," and it "defines and explains the legal standards applied in military law to determine whether a person was mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court martial." The technical manual does not promulgate the law relating to insanity. Paragraph 120 of the Manual for Courts-Martial, United States, 1951; and the relevant decided cases constitute the only authoritative statement of legal principles. The technical manual contains merely information and instructional matter on the subject, primarily for the use of medical experts in investigating or testifying to mental responsibility for crime (AR 310-20, pars. 21, 22). The fact that lawyers and psychiatrists use different language in the general field of "mental" aberrations makes useful a treatise which undertakes to bridge the gap between the two vocabularies, and the translation of psychiatric observation into legal categories is facilitated by Technical Manual 8-240.

75 Thus, it appears that the prosecution witnesses were at liberty—in fact were to be encouraged if they so desired—to use the language of TM 8-240 and to benefit from its analysis. Just as any other medicolegal treatise, it may be used or not in the discretion of the expert witness. The defense has no basis for complaint on this ground.

With respect to General Chamber's testimony, the record of trial reveals that the only use made of TM 8-240 on cross-examination was to ask the witness to phrase his medical conclusions, already testified to in his own language, in terms helpful in applying the legal criteria. We believe that such use of the manual was proper.

c. *Admissibility of Certain Evidence.*

The trial defense counsel objected to the admission in evidence of: one, the testimony of the maid Tani relating to the statement of Colonel Smith that the accused had stabbed him; and two, the testimony of the two nurses relating to the accused's statements made in their presence. These two matters were also assigned by appellate defense counsel as prejudicial error.

The first objection listed above was made by trial defense counsel specifically on the ground that the statement was hearsay and did not meet the requirements for admissibility as a dying declara-

tion (R. 54, 60; App. Ex. 2). Conceding *arguendo* that it was not a dying declaration or a spontaneous exclamation, we hold that the objection was properly overruled because of the well recognized rule that an undenied accusation made in an accused's presence that he has participated in an offense may be regarded as incriminating evidence which is admissible (MCM, 1951, subpar. 140*a*, p. 251; Egan v. United States, 137 F. 2d 369, 380-381 (8th Cir. 1943); Gentili v. United States, 22 F. 2d 67, 68-69 (9th Cir. 1927)).

The second objection listed above was made by trial defense counsel specifically on the ground that the accused was in no condition to make a voluntary statement at the time (R. 184, 194). The testimony of the nurses as to the accused's hysterical state part of the time was obviously the basis of the objection. Generally, an impairment of the mental faculties short of insanity at the time a statement is made by an accused does not affect the admissibility of the statement, but such impairment is evidence to be con-
76 sidered by the court in determining the weight or effect to be given the statement (see Mergner v. United States, 147 F. 2d 572 (C. A. D. C. 1945); Bell v. United States, 47 F. 2d 438, 439-440 (C. A. D. C. 1931); and People v. Lehew, 287 Pac. 337, 340 (Calif. 1930)). Appellate defense counsel additionally asserts that the admission in evidence of these statements was error because the accused had previously been officially interrogated by one Agent VanDyke, was, at the time of making the statements, in official custody and suspected of having committed a crime, and had not been advised of her rights under Article 31 of the Code prior to making the statements in question. Such theory, however, appears to us as forever barring the receipt in evidence of any spontaneous utterance made to a disinterested party once an accused has been taken into custody or interrogated. Here, the statements were unsolicited and the accused was not being investigated by the parties who were present when they were made (see United States v. Creamer (No. 179), 3 CMR 1, 7-8; see also CM 360336, Sanchez, — CMR —, 5 Mar. 1953). Therefore, we hold that the objection was properly overruled, the assignment of error is without substantial merit and the statements were admissible.

d. *Instructions as to Lesser Offenses.*

Appellate defense counsel asserts that the law officer committed fatal error by instructing the court that it might find the accused guilty of unpremeditated murder if it found that she was engaged in an act inherently dangerous to others and evincing a wanton disregard of human life. We observe that the law officer also instructed on the intent to kill or inflict grievous bodily harm form of unpremeditated murder.

We concede, on the basis of the recent decision of the United

States Court of Military Appeals in the *Joe L. Davis* case (United States v. Joe L. Davis (No. 646), — USCMA —, 14 May 1953) that the evidence in the instant case in no way raised the offense involved in the instruction complained of. However, we believe that this case is clearly distinguishable from the *Davis* case because the accused was found guilty of premeditated murder as charged. Thus, the error, since it was not considered by the court, was harmless (see State v. Zupkosky, 21 A. 2d 771, 775 (N. J. 1941)).

e. Motion for New Trial.

77 The accused petitioned The Judge Advocate General of the Army for a new trial under the provisions of Article 73 of the Uniform Code of Military Justice. In accordance with that article, The Judge Advocate General referred this petition to the board of review for action.

In her petition the accused asserts in substance that new evidence has been discovered which would probably produce "a substantially more favorable result for the accused"; that the conscious suppression by trial counsel of evidence favorable to the accused was fraud on the court, constituted a denial of due process of law, and voided the findings and sentence; that such suppression prejudiced the accused's substantial rights; and that had such evidence been introduced, it probably would have resulted in a finding of not guilty. These assertions were based upon the facts that Captain William E. Mayer, Medical Corps, a member of the board of officers convened prior to trial to inquire into the accused's sanity, signed the board's report because he believed that the conclusions set forth therein met the requirements contained in TM 8-240, *Psychiatry in Military Law;* that if the same questions had been propounded to him in civilian practice, where he was not subject to the limitations imposed by the cited technical manual, he would not have fully concurred in the conclusions reached by the board because, "from a purely medical point of view," he was of the opinion that the accused was suffering from a mental defect, disease or derangement at the time of the alleged offense, that she was incapable of "setting out to kill her husband in a calculated, premeditated way," and that her ability to adhere to the right was impaired. His opinion as to her ability to adhere to the right was based on the belief that the legal test contained in the aforesaid technical manual that an accused would not have committed the act charged had a policeman been present at the time is not in any way determinative of the diagnostic problem which an accused's mental condition presents from a purely medical point of view so as to preclude a medical determination that such accused's ability to adhere to the right was impaired. However, he signed the board's report because he believed that if a policeman had been present, the accused would not

have consciously "stabbed" her husband to death although she would have "struck" him. Captain Mayer stated that this was his opinion prior to trial and that he so informed trail counsel and assistant trial counsel prior to trial. Captain Mayer was not called as a witness by the prosecution. Defense counsel asserts that he was not informed of the matter, although he was present when the report was typed and witnessed the signing of it by several members; that he did not become aware of the information until after the trial; and that the trial counsel's constant reference to the board report as being the unanimous opinion of the members was improper.

77a We are not moved to the view that this testimony, if produced at the trial, would have resulted in a finding favorable to the accused for the reason that Captain Mayer did not say that the accused was unable to adhere to the right, but rather that her ability to do so was *impaired*. Under the *Manual for Courts-Martial, United States, 1951*, the impairment must not only be the result of mental defect, disease or derangement, but must completely deprive the accused of his ability to adhere to the right as to the act charged (MCM, 1951, subpar. 120*b*, p. 200). But assuming, *arguendo*, that Captain Mayer's alternate opinion went so far as to agree with that of defense's expert witness, we believe that the defense is barred from relief because it failed to exercise due diligence to discover the evidence before trial. The witness was not only available to defense counsel, but defense counsel admits that he (defense counsel) was present when several members of the board signed the report. Where, as here, the main issue in a case is the sanity of the accused, it seems incredible to us to conclude that due diligence has been exercised when the against the accused prior to trial. Moreover, we think no fraud defense counsel admits that he did not interview the witnesses has been perpetrated upon the court because the witness, in applying the legal test recognized in military law, the one which the court was bound to follow, was in complete accord with the other members of the board.

No good cause for the granting of relief under Article 73 of the Code therefore appears.

f. *Sufficiency of the Evidence.*

We turn now to a consideration of the evidence to determine its sufficiency to support the findings of guilty of premeditated murder.

Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended (MCM, 1951, subpar. 197*d*, p. 352). When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution (ibid.).

"It is a cardinal rule of law that questions of fact are determined in forums of original jurisdiction or by those which are expressly granted the authority by constitution or statutes" (United States v. McCrary (No. 4), 1 CMR 1, 3). We have no hesitancy—

* * *

78 Department of the Army
Office of the Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army, before SCARBOROUGH, BERKOWITZ and CHALK, Members

CM 360857

UNITED STATES

v.

DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters Far East Command, APO 500.

HEADQUARTERS AND SERVICE COMMAND
FAR EAST COMMAND

Sentence adjudged 10 January 1953. Approved sentence: Confinement for life.

Appellate Counsel for the Accused: Brigadier General Adam Richmond, USA (Ret.), Lieutenant Colonel George M. Thorpe, JAGC, First Lieutenant John W. Fuhrman, JAGC.

Appellate Counsel for the United States: Lieutenant Colonel William R. Ward, JAGC, First Lieutenant Kenneth A. Howard, JAGC.

DECISION ON RECONSIDERATION—November 16, 1953

Upon original review of the record of trial in the above-entitled case, the board of review, by its decision dated 26 May 1953, affirmed the approved findings of guilty of premeditated murder, in violation of the Uniform Code of Military Justice, Article 118, and the sentence to confinement at hard labor for life.

Upon motion of appellate defense counsel for reconsideration by the board of review of additional evidence on the issue of insanity, the United States Court of Military Appeals ordered the original record of trial returned to The Judge Advocate General of the Army for reference to the board of review for further consideration in accordance with the motion. Upon receiving
79 the record on 24 August 1953 the board, for good cause shown, on 15 September 1953, ordered a rehearing before

it, which was in due time accomplished and arguments were heard by appellate defense and Government counsel.

I

At the rehearing, the board received from appellate defense counsel a report of a board of three medical officers convened at Letterman Army Hospital subsequent to the date of trial to inquire into the accused's mental condition at all times pertinent to the issue. The board also received from appellate defense counsel a report of two civilian expert consultants to The Surgeon General, one in Psychiatry and one in Clinical Psychology, who conducted an examination of the accused at the same facility and at relatively the same time. The diagnoses of each group was identical but the civilian consultants concluded that the accused, at the time of the commission of the offense, was unable to distinguish right from wrong or to adhere to the right. The three medical officers' conclusions were as follows:

"(a) It is the opinion that the accused was so free from mental defect, disease, or derangement with respect to the act charged as to be able to distinguish right from wrong.

"(b) At the specific time of the commission of the alleged offense, the individual's condition is estimated to have been such as to markedly impair and diminish her ability to adhere to the right.

"(c) It is the opinion that at the time of trial, the accused possessed sufficient mental capacity to understand the nature of the proceedings against her and to cooperate in her defense.

"(d) Because of the degree of drug intoxication existing at the time the alleged offense was committed, it is believed that the accused was not capable of having the degree of intent and willfulness which would constitute premeditation."

It is readily apparent that the conflicting medical opinions now before the board are substantially the same as those considered and evaluated in the previous decision in that acceptance of one against the other, insofar as the sanity issue is concerned, inevitably must result in affirmance or disaffirmance of the findings in whole or in part and the sentence. After carefully considering and weighing all of the evidence relating to the issue *de novo*, the board finds that the accused was mentally responsible for her acts at all times pertinent to the issue and was capable of forming the specific intent to kill and considering the act intended so as to constitute premeditation. The board further finds that the accused, at the time of the trial, was able to understand the nature of the proceedings against her and intelligently to cooperate in her defense.

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Appellate defense counsel, at the rehearing before the board, requested the board to take the testimony of Colonel Emmett B. Litteral, Medical Corps, a member of the board of medical officers convened at Letterman Army Hospital, aforementioned, at some future date. The request was not supported by any evidence of the witness' expected testimony but it is assumed that he would testify in accordance with the following remarks contained in paragraph 9 of the board report:

> "The medical officers who have examined Mrs. Smith and whose names will be signed to these findings, function in a somewhat differently structured medico-legal context than their civilian colleagues who have also examined the accused. By this, it is inferred that the military psychiatrists [sic] latitude is in effect somewhat diminished as to what findings he may make by the established body of medico-legal policy and precedent now codified in part in TM 8-240. It is the impression of the undersigned that in a civilian jurisdiction a much more liberal interpretation of issues of mental responsibility in crimes of violence is frequently observed. These statements are made in an attempt to explain some of the difference of opinion as to the accused's responsibility expressed by military and civilian psychiatrists."

That a marked distinction exists between the technical medical view of mental responsibility and the medico-legal view of mental responsibility, the latter being the yardstick in military law, is so well established and recognized as to require no elaboration here. The problem was thoroughly explored in the former appellate proceedings and our views are consistent with those expressed there. As we have decided that no favorable result to the accused would attend our granting the request, the same is hereby denied.

81

II

After the rehearing before the board of review, appellate defense counsel submitted, and we have accepted, a supplemental assignment of errors in which it is asserted that reversible error was occasioned by the underscored portion of the following instruction of the law officer:

> "If, *in the light of all the evidence, including that supplied by the presumption of sanity*, the court has a reasonable doubt as to the mental responsibility of the accused at the time of the alleged offense, the court must find the accused not guilty of that offense." (Underscoring supplied)

Appellate defense counsel relies primarily upon the case of *State v. Green*, 6 P. 2d 177 (Utah, 1931), wherein the Supreme Court

of the State of Utah held that when evidence tending to show that the accused person was insane enters into the case, the presumption of sanity, not being evidence, disappears and may not be considered by the jury; and that an instruction, in such a setting, which allowed the jury to consider the presumption as evidence was reversible error.

Appellate Government counsel, on the other hand, argues in substance that the instruction conforms to the language of the Manual which provides:

> "If, in the light of all the evidence, including that supplied by the presumption of sanity, a reasonable doubt as to the mental responsibility of the accused at the time of the offenses (120b) remains, the court must find the accused not guilty of that offense." (MCM, 1951, subpar. 122a, p. 202)

and that we need go no further for authority to overrule the assignment of error. Appellate Government counsel points out that the Manual provision above-quoted conforms to the language employed in *United States* v. *Davis*, 160 U.S. 469, 488 (1895), a case frequently cited on insanity problems, wherein it was stated:

82 > "If the whole evidence, *including that supplied by the presumption of sanity*, does not exclude beyond a reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal." (Underscoring supplied)

We have no doubt that the Manual provision indirectly under attack has its root in the Davis case, *supra* (see Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 168).

From what has been said thus far, it is readily apparent that our acceptance of defense's position would result in our denouncing the Manual language as not controlling. This we are not prepared to do for reasons which will hereafter become crystal clear.

Our independent research has revealed authorities too numerous to mention here which hold contra to those cited by the defense. In fact, the Supreme Court of Utah, in applying the law of Nevada in a negligence case, stated:

> "The law of Nevada, lex loci, and not the law of Utah, lex fori, must govern on the question as to whether the jury could consider and weigh the presumption of negligence, along with the other evidence on the question of defendant's negligence and proximate cause. The trial court applied the Nevada rule, which was the correct procedure."

In *Commonwealth v. Cox*, 100 N.E. 2d 14, 16 (Mass., 1951), the following language from an earlier case (Commonwealth v. Clark, 198 N.E. 641, 645 (Mass., 1935)) was quoted with approval:

> "The fact that a great majority of men are sane, and the probability that any particular man is sane, may be deemed by a jury to outweigh, in evidential value, testimony that he is insane. * * *. It is not * * * the presumption of sanity that may be weighed as evidence, but rather the rational probability on which the presumption rests."

In *Tatum v. United States*, 190 F. 2d 612, 615 (1951), the United States Court of Appeals, District of Columbia Circuit, in discussing mental responsibility, referred to the Davis case, *supra*, as the "leading authority on the subject" and quoted with approval the language we have heretofore quoted from that case.

83 As there is respectable civilian authority which supports the Manual provision, we advert to the rule which provides that the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1951*, in the absence of conflict, share an identical authoritative position (United States v. Krull (No. 934), 3 USCMA 129, 11 CMR 129). Since we find no such conflict, the Manual provision has the force of law (see UCMJ, Art. 36) and is binding upon us. Accordingly we hold that the assignment of error is without merit.

Action by the Board

For the reasons stated, the board of review, upon reconsideration, finds the approved findings of guilty and the sentence as approved by proper authority correct in law and fact, and having determined, on the basis of the entire record, that such findings of guilty and sentence should be approved, the same are hereby

Affirmed.

RICHARD SCARBOROUGH,
CHARLES J. BERCOURT,
JOSEPH L. OFULT.

84 United States Court of Military Appeals

No. 3370

UNITED STATES, APPELLEE

v.

DOROTHY K. SMITH (DEPENDENT WIFE OF COLONEL AUBREY D. SMITH, DECEASED), APPELLANT

ON PETITION OF THE ACCUSED BELOW [1]

BRIG. GEN. ADAM RICHMOND, U. S. Army (Retired), LT. COL. GEORGE M. THORPE, U. S. Army, and 1ST LT JOHN W. FUHRMAN, U. S. Army, for Appellant.

LT. COL. WILLIAM R. WARD, U. S. Army, and 1st LT. KENNETH A. HOWARD, U. S. Army, for Appelle.

OPINION OF THE COURT—Decided December 30, 1954

PAUL W. BROSMAN, Judge:

A general court-martial convened at Tokyo, Japan, found the accused woman guilty of the premeditated murder of her husband, Colonel Aubrey D. Smith, United States Army—in violation of the Uniform Code of Military Justice, Article 118, 50 USC § 712. She was sentenced to be imprisoned for life. The convening authority approved the findings and sentence, and a board of review has affirmed. This Court granted her petition for review of the case.

II

At the trial, the defense assailed the jurisdiction of the court-martial over this civilian accused—and the same matter has been raised here. In this connection we observe that, at the time of his death, Colonel Smith was stationed in Tokyo, and that
85 the accused was there as his dependent. Therefore, at all times prior to his death, she was accompanying the Armed Forces, within the meaning of Article 2(11) of the Uniform Code, 50 USC § 552. Accordingly, she would have been subject to trial by a court-martial. See Madsen v. Kinsella, 343 US 341.

We do not perceive how this status terminated at any time before the accused's trial. Colonel Smith died at about 6 a. m. on the morning of October 4, 1952. Mrs. Smith was then in military custody and under guard as a result of having assaulted him several hours before. She remained a prisoner—or at least was hospitalized in a military medical facility—until the date of the trial. Thus,

[1] CM 360857.

she cannot be said to have "merged" with the Japanese population—with the result that she must have remained subject to military jurisdiction. See United States v. Garcia, 5 USCMA 88, 17 CMR 88; United States v. Schultz, 1 USCMA 512, 4 CMR 104. Indeed, the circumstances establishing jurisdiction are much stronger here than in the Garcia case, and our discussion there—together with the opinion of the board of review in the instant case[2]—fully disposes of the jurisdictional contention.

III

The accused also complains that fatal error was committed in admitting in evidence a statement made by Colonel Smith to his Japanese maid to the effect that his wife had stabbed him. The maid had been called late at night by Colonel Smith and discovered him lying in bed disabled by what proved to be a knife wound. Since it is improbable that there was any sort of expectation of death on the Colonel's part when he made the remark, we feel sure that its language was inadmissible as a dying declaration. See Manual for Courts-Martial, United States, 1951, paragraph 142*a*; United States v. DeCarlo, 1 USCMA 91, 1 CMR 90.

86 However, a forceful argument has been made for the reception of the deceased's utterance as a spontaneous exclamation, made under circumstances reflecting no occasion to deceive. See Manual, supra, paragraph 142*b*; United States v. Mounts, 1 USCMA 114, 2 CMR 20. While we incline to accept this view, we shall assume arguendo that the law officer erred in admitting the statement. Yet the comment of Colonel Smith pertained only to the identity of his assailant. The evidence—forthcoming from both Government and defense witnesses[3]—was so overwhelming on

[2] 10 CMR 350. In view of our holding on this point we need not consider claims of military jurisdiction grounded on Article 3 of the Uniform Code, 50 USC § 553. That Article—providing for continuance of jurisdiction over serious offenders who cannot be tried by American civilian courts—was recently upheld by the Court of Appeals for the District of Columbia, Toth v. Talbott, 215 F 2d 22, cert. granted 348 US 809.

[3] The psychiatric testimony having to do with Mrs. Smith's personality disorders—which occasionally eventuated in aggressive acts against others—itself suggests strongly that she committed the instant homicide. In addition to inclination, she possessed opportunity for the misdeed. Also, she was seen with the death weapon, an Okinawan knife which she had requested the Japanese maid to seek and deliver into her possession several days prior to the homicide. As if to remove all conceivable doubt of her guilt, Mrs.

this point that any error relating to identity become quite insignificant. As revealed by the evidence, as well as by the closing arguments of counsel, the only real issue at the trial was the state of mind—the mental condition—of the accused when she stabbed the Colonel. Since his statement sheds no light whatever on this subject, its reception could not have been prejudicial.

IV

A further assault has been made in this Court on the principles of military law dealing with mental responsibility—one stemming chiefly from a recent thoughtful and scholarly opinion of the United States Court of Appeals for the District of Columbia. United States v. Durham, 214 F. 2d 862. Prefatory to a consideration of this attack, it must first be noted that the long-established military test of mental responsibility is phrased in terms of whether the accused was, at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. Manual, supra, paragraph 120*b*; 87 Manual for Courts-Martial, U. S. Army 1949, paragraph 110*b*; Manual for Courts-Martial, U. S. Army, 1928, paragraph 78*a*. See also Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, pages 294-6.

Emphasis is placed—it will be observed—on the distinction between the "mental defect, disease, and derangement," which may exculpate from criminal liability, and the "mere defect of character, will power, or behavior," which will not serve to exonerate an accused. This distinction meshes well with the content of the Joint Armed Forces' Definitions of Psychiatric Conditions, promulgated in June 1949—only a short time after the appearance of the 1949 Manual for Courts-Martial.[4] These Definitions include a generic group of "character and behavior disorders"—among them those which theretofore had been termed "pathological personality" types, as well as types previously regarded as suffering from a "constitutional psychopathic state" or a "psychopathic personality." See SR 40-1025-2, paragraph 6. We construe the character and behavior disorders, dealt with in the Joint Definitions, as simply forming the medical prototypes of the 1951 Manual's reference to

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Smith made numerous admissions having to do with the fatal stabbing, such as "It is too bad I didn't get him in the heart." The board of review sets out a lengthy and detailed presentation of the evidence in its original opinion in the case, printed at 10 CMR 350.

[4] SR 40-1025-2; NAVMED P-1303; AFR 160-13A, dated June 1949.

"character and behavior disorders." Cf. United States v. Poe, 68 BR 141. Indeed, those Definitions, when considered in conjunction with the Manual for Courts-Martial, provide the psychiatric witness before a court-martial with an infinitely clearer picture of what is, or is not, a mental disease than is afforded him in any civilian system of law administration of which we are aware. This clarity, of course, leads to greater agreement among psychiatric witnesses in military law administration, and operates sharply to reduce the occasions for courtroom battles of alienists.[5]

The opinion of the Court of Appeals in Durham v. United States, supra, requires that unless the jury "believe beyond a reasonable doubt either that he [the accused] was not suffering from a diseased or defective mental condition or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity." Disease is said to signify "a condition which is considered capable of either improving or deteriorating," while a defect exists when there is present a condition "not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."

It is evident that the law of mental responsibility as it now exists in the District of Columbia, is far more liberal than the traditional common law view, or than that obtaining in most American jurisdictions. Under the McNaughten Rules—which reign in a majority of states, as well as in England—an accused is deemed responsible for his acts if, at the time of their performance, he knew the difference between right and wrong with respect thereto, as well as the nature and quality of those acts.[6] Weihofen, Mental Disorder as a Criminal Defense, 1954, chapter 3. A number of states, as well as the Federal courts, also exonerate from criminal liability for acts committed as the result of an irresistible impulse. Davis v. United States, 165 US 373; Weihofen, supra, pages 81-100.

So far as can be determined, the principle of the Durham case

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[5] Of course, there is still ample room for differences of judgment, since psychiatric ailments shade with imperceptible gradations from one into another. Consequently, in a borderline case the diagnosis presented by the forensic psychiatrist may well be swayed by his judgment as to appropriate legal consequences.

[6] Sometimes this is stated as "nature and consequences" of the act. There is some question as to what is added by the latter part of the formula—for many courts seem to hold that knowing the nature and quality of the act signifies merely knowing that it is wrong. See Weihofen, Mental Disorder as a Criminal Defense, 1954, pages 72-4. See also, Zilboorg, The Psychology of the Criminal Act and Punishment, 1954, pages 16-18.

receives legal support in the United States almost exclusively from certain New Hampshire decisions. See e. g. State v. Pike, 49 NH 399. Scotland, too, seems to apply a like doctrine. Also a Report of the British Royal Commission on Capital Punishment, 1949-1953, favors the particular extension of the McNaughten Rules which is embodied in the Durham decision. Incidentally, a survey of
89 this very excellent Report—as well as the voluminous Minutes of Evidence submitted to the Royal Commission—makes clear that the Court of Appeals for the District of Columbia was substantially influenced thereby.

We have indicated elsewhere that for the military establishment the law determining mental responsibility is not an open question. United States v. Kunak, 5 USCMA——, 17 CMR——. In the Federal civilian system Congress has legislated on certain procedural matters having to do with insanity. 18 USC §§4241-8; DC Code (1951), § 24-301. However, no such legislation has been forthcoming to govern the field of military law. Moreover, the Secretaries of the several Armed Forces have long been empowered to commit "insane persons," and to retain them in medical custody so long as mental disorder persists. 24 USC § 191; White v. Treibly, 19 F. 2d 712 (CA DC Cir.); Overholser v. Treibly, 147 F. 2d 705, cert. denied, 326 US 730. The grant of this power to a Federal executive branch is indeed unique. Cf. Wells v. Attorney-General of the United States, 201 F. 2d 556 (CA 10th Cir.); Higgins v. United States, 205 F. 2d 650 (CA 9th Cir.); cert. dismissed 346 US 870.

The authority to determine who shall be committed as insane should in practice be linked with the determination of who shall be acquitted as mentally irresponsible—since in the ordinary case, a person properly acquitted by reason of insanity requires treatment in a mental institution. Yet, unless commitment procedures are integrated with the administration of criminal law, there is more than a fair risk that an accused may avoid both the jail and the asylum. Naturally, integration of these procedures can best be achieved by providing that the rules concerning commitment on the one hand, and criminal irresponsibility, on the other, issue from the same source. Since Congress has expressly entrusted the determination and administration of commitment procedures to the executive branch—of course, with review of its action through habeas corpus—we find no anomaly in concluding that Congress may also have acquiesced in the formulation by the Chief Executive of standards for determining sanity in trials by court-martial.

90 However this may be, were the question an open one in this Court—which it is not—we would be hesitant at the present time in adopting for the military establishment the approach of the Durham case. It seems appropriate to supplement our opinion in United States v. Kunak, supra, by noting there some of the reasons

for this hesitancy. In the first place, we are—it must be confessed—somewhat troubled by the uncertainty of the criterion set down in Durham to the effect that, to be exculpable, a criminal act must be the "*product*" of mental abnormality. Indeed, there may be some controversy concerning the scientific validity of the premise that a criminal act may be committed which is *not*, in some sense, a product of whatever mental abnormality may exist. Would not the presence of any abnormality operate to create reasonable doubt in the accused's favor if there is aught to the view—constantly reiterated by psychiatrists—to the effect that human personality may not properly be compartmentalized, and that the McNaughten Rules erred in assuming the possibility of monomanias?[7]

Another possible difficulty is that—under Durham as presently developed—the members of a court-martial would be afforded no guidance in determining when mental disease exonerates since causation is so broad a concept. Naturally predictability is diminished when results are made to hinge almost entirely on
91 the views of causation entertained by the particular court which tries the accused.[8] Instead of a situation resulting in

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[7] E. g., Dr. Overholser states: "The old concept of 'monomania,' in which a delusion is found without other mental involvement, is not today accepted by psychiatrists, although the word and concept seem to die hard in the law!" Overholser, The Psychiatrist and the Law, 1953, page 63. See also, Weihofen, supra, pages 109-11. Accordingly, a cut-and-dried rule has been advocated by some, "namely that criminal responsibility in such cases should depend simply upon the presence or absence of a clinically recognizable major mental disorder (psychosis) or gross mental deficiency (imbecility or idiocy) at the time the crime was committed" Weihofen, supra, page 116. Cf. Report of Royal Commission on Capital Punishment, Appendix 9, paragraph 12(f) (law in Norway), (hereafter cited Royal Commission Report); MacNiven, Psychoses and Criminal Responsibility, Mental Abnormality and Crime, 1944, page 60; TB MED 201, paragraph 4*b*(3). Another commentator, however requires a *relationship* between the psychological disorder and the crime to be established, and relates: "Thus a patient of mine who heard imaginary voices, broke into and entered a shop, but he did not do so because of the promptings of his imaginary voices, but on account of the promptings of some very real and very undesirable associates." Neustatter, Psychological Disorder and Crime, 1953, page 12.

[8] Predictability of the result facilitates the disposition of the charges prior to hearing in such a way that the expense and travail of a trial may be avoided. If, however, the matter is to be placed in the jury's lap without guidance to its members, consistency would

an equal and uniform application of the law, we might well find one in which an accused's fate would hinge on his financial ability to secure the services of glib counsel and to hire persuasive expert witnesses. Also, is the testifying psychiatrist to be permitted to furnish a medical diagnosis only—with little correlation to the central inquiry before the court—or may he also answer the crucial question of whether the accused's act was "caused" by a mental abnormality?

The comment has been voiced that—realistically considered—the "certainty" of today's rules is wholly illusory in any case—since, in its determination of the question of sanity, a jury tends to follow not the law as enunciated by the trial judge, but rather the dictates of its members' sympathy or want of sympathy with the accused person before it. And it is added in hortatory vein that the law should fall into step—and must discard its effort to limit the jury through the use of narrow tests like those of the McNaughten Rules. We are sure that the anarchy, thus assumed to exist in the jury's processes, is not so widespread as the exponents of this argument would have us believe.[9] Indeed, in many instances the juror,
92 or other trier of fact, may be grateful for the legal rule which serves to aid him in the determination of a difficult question.

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seem to demand that charges not be dismissed on grounds of irresponsibilty without trial—for the reason that this action would invade the jury's province.

With reference to predictability, it is to be observed that Judge Frank has suggested that the craving for certainty in the law reflects deeply-embedded irrational drives. See e. g., Frank, Law and the Modern Mind, 1930, chapters I, II. Regardless of whether this be true, it seems clear that unpredictability of legal consequences does not generally enhance respect for and confidence in the law—qualities which are highly desirable. Moreover, this unpredictability may serve to encourage frivolous, dilatory defenses, or to provide an added incentive to gamble on crime in the first instance.

[9] Some weight, too, must be given to the effect of rules of law in shaping psychiatric testimony. For example, a psychopath cannot in military law qualify for exculpation by reason of irresponsibility, for the reason that he is not deemed to possess a mental *defect, disease, or derangement*. A psychiatrist who is aware of this legal construction of the term "mental defect, disease, or derangement" could not, therefore, conscientiously link a diagnosis of psychopathy with a conclusion of irresponsibility. Presumably his testimony, if he is called as an expert witness, would reflect this circumstance. We would surmise that, in turn, the finding of the court-martial would ultimately mirror the original clinical diagnosis and the ensuing testimony.

and thus removes in some measure the strain of moral decision on his part.[10] Furthermore, the argument is self-defeating, for, if instructions on sanity are of no avail in any event, then appellate courts need not concern themselves with the review thereof—and surely should not predicate reversal on supposed errors in their language.

Whatever the vagueness of the Durham rule in its present stage of elaboration, it might have little practical significance if the test laid down were combined with an insistence on a differentiation between mental defect, disease or derangement, on the one hand, and character and behavior disorders, on the other. We are somewhat unsure of what the Court of Appeals intends in this particular. The opinion in Durham refers to criminal acts caused by mental disease or defect, but no sort of effort is made to juxtapose these against character or behavior disorders. Indeed, it appears that the definitions there of mental disease and defect are pointed principally toward settling a matter which is perhaps unclear under the strict wording of the McNaughten Rules—that is, that a *defect* of the mind, as well as a disease thereof, should serve to free from criminal responsibility. See Royal Commission Report, paragraph 335.

It may be suggested that the test of irresponsibility advanced in Durham is in part a response to the occasional criticism by psychiatrists that they have been forced in the courtroom to respond to questions which extend beyond their medical expertise.

93 Indeed, certain members of this profession seem at times to wish to do no more than present a medical diagnosis to the jury. In light of the esoteric nomenclature used in the field, and the hypertechnical divergence between various schools of psychiatric thought, as well as because of the complexity and sheer uncertainty of the area under exploration, it can readily be imagined what wholesale want of enlightenment would eventuate from *purely* medical testimony from the witness-psychiatrist.[11] In the unlikely

[10] Incidentally, a jury unbridled by legal definitions will not always benefit an accused. For instance, the members of a jury might—when confronted with a prognosis, for the accused of incurable insanity—return a conviction and death sentence with euthanasia in mind, or motivating them subconsciously. Cf. Royal Commission Minutes, Q 7395. Also, the jury might in certain cases be moved by fear. See, e. g., Overholser, supra, pages 59-60. The impersonality involved in letting the "law" make a decision on standards of irresponsibility may shield the juror from guilt feelings about his decision.

[11] The problem of communication is well treated by Dr. Davidson. See Psychiatrists in Administration of Criminal Justice, 45 J. Crim. Law 12 (1954).

event that the Court of Appeals intended this result, we fear that transplanting this view in the military establishment would render the court member's lot—like that of the policeman in the song—a distinctly unhappy one.

If, however, the medical witness is to be permitted to testify concerning the existence of "mental defect or disease," what criteria are to be furnished him in this regard? In military law as it presently exists, we find in the Joint Definitions of the Armed Forces, supra, a usefully detailed guide. And we inclined to believe that, under the law governing the military, the insanity defense usually falls—if fall it does—on the absence of "mental disease or defect." However, the psychiatric witness is wholly lacking in guidance of this nature under most civilian statutes. And there are few judges, we suspect, who would feel sufficiently qualified—or be daring enough—to instruct a witness, or a jury, as to whether the psychiatric diagnosis made amounted in a particular case to mental disease or defect under the law. Under the present administration of mental responsibility, the witness, or the jury, in the usual civilian court *does* possess the standard that the disease found to be present must be such as to deprive of ability to distinguish right from wrong—or, in jurisdictions where irresistible impulse is accepted, of ability to resist the impulse to do wrong. In light of those criteria of gravity, it is chiefly the psychotic who escapes punishment.

But what if every effort is abandoned to define that "mental disease or defect" which will free from criminal responsibility?

94 In this connection one might inquire into the question of what proportion of serious offenders are mentally normal. It has been argued, indeed, that in a real sense one cannot be deemed normal who lacks the conscience to abide by the laws of society. One legal author writes, for example, that "Psychologists, psychiatrists, and neurologists attribute all crime to mental disease." Dangel, Criminal Law, 1951, § 128, n. 44, page 234.[12] While this statement

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[12] Such a view was perhaps implicit in the words of one medical writer: "From the psychiatric point of view, therefore, the criminal as such has ceased to exist." White, Insanity and the Criminal Law, 1923, page 26. Cf. Glueck, Changing Concepts in Forensic Psychiatry, 45 J. Crim. Law 123 (1954); Neustatter, supra, page 11. Royal Commission Minutes, page 462, paragraph 21; also Qs 6395-6. Something like this point of view was recently put, in exaggerated form and ironically, by a British writer, himself neither a psychiatrist nor a lawyer: "In the new Britain which we are building, there are no criminals. There are only the victims of inadequate social service." Evalyn Waugh, Tactical Exercise. The negligible impact

constitutes an exaggeration, of course, even the medical profession will agree, we suspect, that the tendency of at least some psychiatrists to attribute crime to mental disease is frequently enhanced—doubtless unconsciously—when they are retained as defense witnesses in a criminal case. Cf. White, Insanity and the Criminal Law, 1923, chapter V.[13]

95 Those who believe that every crime reflects the existence of mental disorder render the notion of disease meaningless.

of such an approach on a jury is suggested by the following testimony of Lord Cooper:

> ". . . The case of *Braithwaite* was peculiar, at least to me, because of the fact that there was evidence of an expert that every criminal was suffering from diminished responsibility and should be treated as such—the extreme view which Dr. Slater will be familiar with. The jury objected to that view and found the man guilty of murder, and I sentenced him to death." [Royal Commission Minutes, Q 5521.]

Of interest in the same connection is the following passage from the cross-examination of a Dr. Grierson, a Prison Medical Officer, called by the Crown as a witness in the Trial of Neville Heath: Q: "And the man who did that sort of thing [sadistically killed a young lady] must have been a most abnormal sort of man?" A: "Yes. I have never yet said that any murderer is normal." See Critchley, The Trial of Neville George Clevely Heath, 1951, pages 29, 179. A Dr. Hubert, prominent psychiatrist, testified for the defense in that case to the effect that Heath suffered from "moral insanity," and therefore should be exculpated under the McNaughten Rules, since he did not, in one sense, "know" that society considered his acts wrong. The cross-examination of the witness revealed strikingly some of the practical difficulties in so broad a conception of what "disease of the mind" should free from criminal accountability.

[13] Dr. White explains frankly that it would be expecting the impossible to anticipate that a witness would be completely devoid of partisanship. In The Show of Violence, 1949, Dr. Wertham, a well-known psychiatrist, hints at the partisanship of the expert, and jokingly comments on testimony in the celebrated Robert Irwin case:

> "Physicians of the utmost fame
> Were called in turn, and when they came
> They answered as they took their fees
> There is no cure for this disease."

[See pages 151, 158-9.]

insofar as mental responsibility is concerned.[14] While their conclusion may accord with the premises of determinism, it scarcely squares with the assumptions of free will and culpability which underlie our penal legislation. Indeed, many psychiatrists will recognize the justice of this criticism and insist that—in even so serious crime as murder—the accused may be suffering from no sort of mental disease, and will point out as well that there are valid clinical criteria for distinguishing the diseased from the "normal" criminal.[15] Perhaps this is true despite the existence of ill-defined "wastebasket" categories like that of psychopathy.[16]

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[14] On this premise sanity would be an issue in every case of greater gravity than a traffic offense. Presumably the judge, or in courts-martial the law officer, would then in every case be required to instruct on the possibility of an insanity verdict or finding—and a plea of guilty would be impossible. See United States v. Burns, 2 USCMA 400, 9 CMR 30; United States v. Trede, 2 USCMA 581, 10 CMR 79.

[15] See Royal Commission Report, paragraphs 393-402; cf. Royal Commission Minutes, Qs 2548-51. Cf. Henderson, Psychopathic Constitution and Criminal Behavior, Mental Abnormality and Crime, 1944, pages 106, 110.

[16] See Royal Commission Report, paragraphs 393-4; Weihofen, supra, pages 22-31; Overholser, supra, pages 34-5; Royal Commission Minutes, Q 2509. The Royal Commission also comments: "[M]any of the adherents of the psychoanalytic school would not recognise the fundamental distinction and would regard psychopathic personality as a form of mental disease." Paragraph 395. In many instances, the designation "psycopath" when applied to an individual signifies: "first, that the person is not insane, neurotic or mentally defective; and secondly, that he has an abnormal character and temperament." Paragraph 396. "A psychopathic criminal may be regarded as a person with a lasting tendency to come into conflict with the law, owing to defects of temperament and character of a persistent kind, who is not suffering from any recognisable mental disease and could not be dealt with under the Lunacy Act." Paragraph 397. With particular reference to the evidence in the record before us, it is interesting to note the following description given the Royal Commission of the aggressive psycopath: "'The diagnosis is made on persons of habitual abnormal behaviour, behaviour which has been abnormal from childhood; and the disorder of behaviour is seen in abnormal emotional reactivity,' so that the individual who has it shows *abnormal outbursts of temper, outbursts of impulsive violence, outbursts of alcoholic excesses often repeated, of suicide attempts and in some cases of homicidal attempts.*'" Paragraph 398.

However, we are inclined to doubt that these distinctions
96 between the mentally normal and the diseased criminal will be readily explicable to juries if the law provides no criteria—or that, if understood, they will be uniformly applied.

In this connection it should be mentioned that the criticism of the law made by numerous psychiatrists fails to take account of the framework in which a decision as to criminal responsibility must be accomplished. For one thing, it must be reached by laymen, quite unversed in psychiatric terminology, and to whom the expert witness must communicate.[17] For another, the adversary system, the excitement of the courtroom, and the rules of evidence do not always conduce to the same decision which might be arrived at by doctors in calm consultation.[18] Further, it has been argued that the physician is in a position—consciously recognized or no—to profit because of a particular diagnosis. And unlike the normal medical situation, an erroneous diagnosis may not carry untoward consequences for the subject's health. Certainly the diagnosis must be made in an area of great complexity, where a theory may readily be found to sustain virtually any position, and where the possibility of a subsequent establishment of error is infinitesimal—since the witness does not, and necessarily cannot, vouch for a later response under treatment. This delineation of difficulties associated with psychiatric testimony in the courtroom shows why the determination of responsibility for *legal* purposes—and there is no *medical* one to which "responsibility" would ever be relevant—may involve policies,
and a need for general rules, which might be inappropriate
97 were the procedure for determining responsibility otherwise. Of course, our concept of public trial does not permit

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[17] The significance of communication by the psychiatric witness to the trier of the facts cannot be overemphasized. One criterion for appraising a legal test of mental responsibility must be whether the test lends itself to communication with the jury. Naturally enough this is impossible if the test is phrased in terms which have no meaning for the individual juror within the framework of his own experience. Perhaps one reason for the stability of the McNaughten Rules is that an inability to know right from wrong is a concept that has some meaning for the layman—even though by the psychiatrist it is viewed to constitute an unbalanced focus on one facet of personality.

[18] It is noteworthy, indeed, that one prominent forensic psychiatrist has recently gone on record as favoring the hypothetical question. See Davidson, Psychiatrists in Administration of Criminal Justice, 45 J Crim Law 12, 16-7 (1954).

substantial alteration in the basic procedure for the establishment of responsibility.

We must concede that the liberalization of the criteria of mental irresponsibility accords with certain penological concepts to the effect that criminals should be "treated" and not "punished"—for liberalization will necessarily augment the number who will escape "punishment." Unfortunately this policy of "treatment" may not have even complete medical validity—although it may be expected to keep overworked psychiatrists even busier than they are at present. It is not at all certain, we believe, that punishment lacks therapeutic value in many cases. Neustatter, Psychological Disorder and Crime, 1953, page 232; Royal Commission Minutes, Qs 6981-3, 7400-1. Moreover, it is even clearer that—at least in our present state of knowledge—certain types of abnormality often resulting in criminal offenses cannot be "treated" with success. For instance, the expert witnesses before the Royal Commission were highly doubtful that the psychopath could ever be the subject of cure.[19]

Additionally, there are significant factors to be considered quite apart from the rehabilitation of the offender—the goal on which psychiatry, not unnaturally, seems centered. One of these is the deterrence of others by the infliction of punishment, and another the overt manifestation of society's distaste for the act punished. Also, an excessive focus on "treatment," and on criminal behavior as an illness, provides a socially-approved and convenient rationalization or any sort of illicit desire which may cross the mind. Put differently, it provides a convenient role into which the criminal may fit. Cf. Cressey, The Differential Association Theory and Compulsive Crimes, 45 J Crim Law 29 (1954). Then, too, contradiction of the fundamental penological premise of "free will" occurs, which premise—whether or not demonstrable philosophically—seems a pragmatically required assumption, and one that underlies our institutions—beginning, shall we say, with the punishment of the child by his parents.[20]

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[19] Royal Commission Report, paragraph 402. The Commission recommended the establishment of special institutions for psychopaths, a measure which already has been adopted in some European countries. Paragraphs 402, 658-671.

[20] In connection with punishment it is sometimes urged that its value as a deterrent is overrated. For instance, during states of heightened mental tension certain types of individuals may be virtually undeterrable. See, e.g., Royal Commission Minutes, pages 492, 493, 545-6, also Qs 4217-8. The deterrent effects of punishment may, however, be more subtle in operation. For instance, punishment may form a vehicle for upholding an identi-

Regardless of whether the accused offender is to be "punished," there seems little doubt that society should do *something* about him, and should not free him without treatment in lieu of penal action. In England, an accused who is found to have been insane at the time of the commission of the offense charged is consigned immediately to an institution for the criminally insane—and there he remains for such time as the executive authorities consider wise. Neither is the way of the malingerer smooth, for he cannot promptly "recover" his sanity and seek his freedom. Indeed, we are informed that, if the English authorities become convinced of malingering by one found insane by a jury, the inmate will simply be retained in a mental institution for the period he would probably have served in prison by way of sentence. Since the prospects for early release from an asylum are dismal for an accused who is found insane at the time of the offense, and because mental irresponsibility must be pleaded in England,[21] only rarely does an accused find it worth while to make use of the plea, save in capital cases—especially in trials for murder, for which the death sentence is mandatory. Royal Commission Report, paragraph 297. Under these circumstances it is understandable that the Royal Commission should feel no fear that a proliferation of insanity pleas would follow upon a liberalization of the McNaughten Rules.

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In the District of Columbia commitment would also follow automatically upon an acquittal by reason of insanity. See, DC Code, supra, § 24-301; United States v. Durham, supra, fn. 57.

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fication between the State, as the large-scale dispenser of law and punishment, and the father, who within the family generally performs a similar authoritarian function. This identification may redound to the support of the State through the operation of attitudes acquired in childhood. Also, punishment is a graphic manifestation of group disapproval of conduct which harms the group; and this disapproval may ultimately be internalized in conscience. Perhaps too, punishment siphons off in a socially acceptable form some of the hostilities, both conscious and unconscious, which might otherwise disrupt society. Under this last analysis some may conceive of punishment as involving a symbolic sacrifice of the offender to society—through which sacrifice tensions are allayed. See also Royal Commission Minutes, Q 7395. The point here is that it is not for this Court to attempt a sweeping revision of so complex a field as penology.

[21] In military law no formal plea is required to raise the issue of insanity, and a suggestion for inquiry into sanity may properly be forthcoming from any one of numerous sources. Manual for Courts-Martial, United States, 1951, paragraph 122*b*.

However, the road to subsequent release in the District or in other American jurisdictions where an accused is automatically committed to an asylum following an acquittal by reason of insanity would probably be much easier than in England. Indeed, a vexing problem in this country has to do with the accused person sufficiently eccentric to exhibit a convincing insanity defense, yet "sane" enough to obtain release on habeas corpus. See United States v. Biesak, 3 USCMA 714, 14 CMR 132. This danger would appear especially great as to the various so-called psychopathic types. These individuals give many manifestations of mental normality—often enough to obtain release following a sanity hearing. See Cleckley, Mask of Sanity, 2d ed.[22] Also, as is revealed clearly in the testimony before the Royal Commission, they raise difficult problems in mental institutions, and interfere to a marked extent with the therapy of other patients who, unlike the psychopath, may be successfully treated. Cf. Royal Commission Minutes, Q 4381. Many witnesses before the Commission considered that separate institutions should be established for the custody of such persons. Understandably enough, therefore, the superintendent of a mental institution under present conditions possesses a prompting—conscious or unconscious—to release these patients and thus to make available increased facilities for the handling of others whose condition is improv-
100 able. As matters now stand, it is not at all unreasonable to suppose that the goal of retaining the psychopath—and like offender—in some form of custody will be furthered by viewing him as criminally responsible, rather than the converse.[23]

If the termination of commitment is comparatively easy to accomplish, and if the rules of mental responsibility are liberal, it is obvious that the premium on malingering is enhanced. Of course, many psychiatrists urge that this danger is exaggerated, and that the malingerer may readily be detected by competent

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[22] As it was put to the Royal Commission, psychopaths "are in the most deplorable of all conditions, not sane enough to be at large and not insane enough (in terms of certifiability) to be suitable for Bedlam." Royal Commission Report, paragraph 398. See also White, Insanity and the Criminal Law, 1923, pages 107-27, for other instances of accused persons who managed to evade in the long run both commitment and confinement.

[23] "For the present we must accept the view that there is no qualitative distinction, but only a quantitative one, between the normal average individual and the psychopath, and the law must therefore continue to regard the psychopath as criminally responsible." Royal Commission Report, paragraph 401.

examiners. Several observations seem proper in this connection. In the first place, will not the difficulty of shamming insanity vary, in some measure at least, with the degree of mental illness which must be feigned for a defense purpose? To put the matter in another fashion, will not a feigned *psychosis* be more easily detectible by a trained psychiatrist than some *lesser* mental ailment which is equally sham.[24] Yet if the lesser disturbance will constitute a defense to crime, it is undeniable that there will be an incentive to plead its existence. Moreover, the possibility of detecting the malingerer will vary greatly with the availability of trained psychiatrists and the provision of facilities for observation of the accused by a competent examiner.

[10] Against the background of the foregoing discussion several observations may be made which tend to demonstrate the need for a cautious approach in the military establishment to the liberalization of the criteria for mental responsibility. For one thing, the services of psychiatrists, and the presence of facilities for psychiatric procedures to unCloak the malingerer, may not be readily available in many areas in which courts-martial must function. Thus, feigned mental illness may enjoy better odds of escaping detection. Secondly, the premium on a resort to insanity as a defense is higher in the military establishment than is virtually any other system of law. No more than a reasonable doubt

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[24] Some criminals may be sufficiently abnormal mentally as to have a distinct lead in feigning whatever degree of disorder is necessary for acquittal. Cf. Royal Commission Minutes, Qs 6031-3. More important, while the psychiatrist may be adept in discovering the conscious malingerer, how easily can he detect the etiology of symptoms of abnormality which are not products of the conscious mind. For example, it is known that in certain individuals, physical ailments—often termed psychosomatic—may be developed to satisfy an unconscious desire—such as a craving for attention or sympathy. Similarly amnesia may involve the repression of distasteful memories. See United States v. Olvera, 4 USCMA 134, 15 CMR 134. If a successful insanity defense is rendered too easy of accomplishment, will not one accused of crime develop symptoms of mental abnormality—although the development will be unconscious rather than conscious? In short, when society puts too high a premium on mental illness, will not such sickness be sought both consciously *and* subconsciously? We doubt that the psychiatrist will be so successful in detecting mental abnormality developed *after* an offense as a variety of subconscious defense mechanism, but not as a form of conscious malingering. In re malingering, see also Neustatter, supra, pages 181-4; Wertham, supra, pages 41-61.

of sanity is required for acquittal. Then, too, commitment does not follow automatically on findings of not guilty by reason of insanity. TM 8-240, AFM 160-42, paragraph 7. In such a case, in fact, the findings of the court-martial are not required to state any sort of conclusion as to mental condition at the time of the offense. As previously noted, the Secretary of the Department concerned may order the commitment "until they are cured" of "insane persons belonging to" that Department. 24 USC § 191. For the Army, the pertinent directive appears to be SR 600-440-1, dated June 7, 1949, and entitled "Disposition of Psychotics." It is unclear whether 24 USC § 191 was intended to be applied to the "psychotic" only; in fact, at the time the statute was enacted, that term may not have been in vogue. Too, in practical operation the Army's SR 600-440-1 may not be limited to "psychotics," as distinguished from other sufferers from mental illness. In any event, the provisions in that Regulation for the disposition of insane persons indicate that the Army, quite understandably, does not propose to undertake extended custody of mentally irresponsible military personnel—although its power to do so has been judicially upheld under some circumstances. White v. Treibly, supra; Overholser v. Treibly, supra. This policy of self-limitation conforms to the general unwillingness to encourage widespread Federal activity in the handling of mentally disordered persons. Wells v. Attorney General of the United States, supra; Higgins v. United States, supra.

102 Consequently the risk that a successful malingerer, or a borderline case of mental disorder, will be released from a Federal mental institution is a comparatively good one. That he will be recommitted in turn by the authorities of a state is a possibility which will vary with the jurisdiction and the nature of the disorder. In the case of a civilian who is subject to military jurisdiction—within which category the present accused falls—the odds of escaping commitment to a mental institution, if acquitted by reason of insanity are especially favorable. We doubt that such a civilian would be considered a person "belonging to" the military establishment involved, within the meaning of 24 USC § 191. Moreover, and unlike a serviceman, Mrs. Smith could not be transferred to an appropriate agency of the Veterans' Administration for disposition and for the institution of commitment proceedings. SR 600-440-1, supra, paragraphs 5*a*, 6*a*, 8; cf. 38 USC, chapter 12A, Veterans' Regulation No. 10, section XIV. In fact, Federal authorities would apparently lack the power to hold her for any protracted period of time, save as directed by the sentence of a court-martial. In truth, the only prospect for her "treatment" would seem to lie either in voluntary commitment or in a decision by some state to accept her as its ward. Cf. SR 600-440-1, supra, paragraph 12*a*.

While the prospect of evading both confinement and long-term commitment would constitute one incentive for a serviceman to gamble on an insanity defense, there are others as well. These include, *inter alia*: (1) a probable exodus from the Armed Service concerned—a pleasing vista in many instances—plus (2) a type of discharge carrying little social stigma and ordinarily permitting the enjoyment of full veteran's benefits. The accused person facing court-martial has literally everything to gain and nothing to lose from an attempt at an insanity defense if he commits an act otherwise criminal.

Weighing these and others of the multiple factors operative in this area, this Court is unwilling at present to essay a liberalization of the current criteria of insanity in military law. Indeed, if we were to envisage a change in the present detailed military distinction between mental defect, disease, or derangement, on
103 the one hand, and character or behavior disorder, on the other, we would feel the need for special wariness. If, however, it is proposed simply to superimpose the Durham causation test on that differentiation, the impact would be of lesser force, and, perhaps—as experience accumulates—such a change may appear desirable, either to the President, the Congress, or this Court.

It may be pointed out, too, that military law reflects many mitigating features in its approach to insanity. One sentenced to confinement will necessarily be under careful scrutiny by prison officials to determine whether mental derangement exists, and in suitable cases may be transferred to a facility for the criminally insane maintained by the Federal Bureau of Prisons. See SR 600-440-1, supra, paragraph 9; 18 USC §§ 4241-8. The sentence to confinement will afford a legal basis for retaining a convicted accused in custody while psychotherapy takes place. For borderline types of mental cases, the form of custody—that is, whether accomplished in a penal or a mental institution—will be determined by the facilities available in each and by treatment prospects. These matters cannot be developed adequately at the trial of an accused, but they can be a subject for intelligent decision by military officials, or later by those of the Bureau of Prisons.

The Royal Commission was especially concerned with the possibility that, by reason of the strict operation of the McNaughten Rules a death sentence might be executed on one who is mentally diseased. Of course, this apprehension centered on the English Rule providing that the death sentence is mandatory in murder cases. In the military establishment, however, a mandatory death sentence is not imposed for murder. See Article 118. Moreover, as to premeditation the doctrine of partial responsibility—to be discussed hereafter—applies, and thereby a finding of guilt may be

limited to one of unpremeditated murder. Furthermore, in a court-martial there is at all times a ready reception—prior to sentence—of evidence of mental impairment or deficiency of any type, even that which falls short of showing irresponsibility. Manual for Courts-Martial, supra, paragraph 123. Thus, despite
104 the stigma of conviction, which still exists for the person convicted of murder under the traditional rules governing mental responsibility—but who might conceivably be acquitted under the approach adopted for the District of Columbia—we are inclined to believe that other and more compelling considerations argue against accepting the more liberal view until further and broader experience is acquired. Cf. Royal Commission Minutes, Qs 7062-5.

V

Defense counsel have also contended on appeal that, although the Manual provides the desiderata for the determination of mental responsibility, Mrs. Smith was prejudiced because of the role played at her trial by "Psychiatry in Military Law," an Army Technical Manual, TM 8-240, dated September 20, 1950. This latter publication is a joint product of the Army and Air Force,[25] which, for the Army, superseded a Technical Bulletin dating from October 1, 1945, TB MED 201. It, in turn, was revised in May 1953. It is the defense's view that TM 8-240 prescribes standards of mental responsibility in addition to, and in some respects different from, those set forth in the Manual for Courts-Martial. They argue further that the Secretary of the Army is without authority to tighten or otherwise to modify the rules governing in this area. Actually the power given the Secretary of the Army by Congress to commit an insane person "belonging to" the Army might well be taken to mean that this official—as well as his superior, the President—does possess authority to *prescribe* rules governing mental responsibility. However, in view of the exercise of the President's authority in this area, and the overriding purpose of uniformity among the Armed Services, we must agree with the defense that the Secretary of the Army does not enjoy rule-making power in this sphere.

Yet this conclusion is inapplicable in the present instance. After a careful examination of TM 8-240, as well as its predecessor, we are convinced that there was no purpose on the part of the Secretary to promulgate *new* rules of military law, but rather
105 only to interpret for the benefit of service psychiatrists the *existing* ones.[26] Also, the Technical Manual supplies infor-

[25] AFM 160-42.

[26] The opening sentence of TM 8-240 announces:

"This manual defines and explains the legal standards applied in military law to determine whether a person was

mation highly useful to the military psychiatrist who will probably be called to testify at trials by court-martial. There is certainly nothing in this construction inconsistent with the function of Technical Manuals which according to the applicable Army directive are designed to

> "... supplement Field Manuals by providing detailed treatment of specific subjects considered necessary for the full accomplishment of required training. They also contain descriptions of materiel and instructions for the operation, handling, and maintenance and repairs thereof, information and instructions on technical procedures, exclusive of those of an administrative nature." [AR 310-20, paragraph 22, dated August 11, 1952.]

We are sure that this technical publication is entitled to "some weight" as an official interpretation of the standards set out in the Manual for Courts-Martial. Indeed this Court has on occasion cited TM 8-240—both in its aspect as an official interpretation of the Manual for Courts-Martial, and as a repository of scientific knowledge compiled by the Surgeons General of the Army and the Air Force. See United States v. Trede, 2 USCMA 581, 10 CMR 79; United States v. Olvera, 4 USCMA 134, 15 CMR 134. However, we have never held—or believed—that the Technical Manual in question was of itself in any way binding on
106 this Court, nor intended to be controlling on either a court-martial or an expert witness.

Of special relevance in the trial of the present cause is paragraph 13*a* of TM 8-240, which emphasizes that a "character or behavior" disorder does not operate to remove an accused's criminal account-

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mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court-martial." [Paragraph 1.]

Unfortunately the wording of this Manual is more peremptory than that used in FB MED 201, its predecessor. Surveying the Technical Manual as a whole, however, we do not think that it seeks to do more than explain existing rules. When those rules are identical with those promulgated in the Manual for Courts-Martial, whatever force they possess arises from their original source, rather than their inclusion in TM 8-240. It may be added that, in light of the presumption of lawfulness attaching to official acts, we are little inclined to assume that the Secretaries of the Army and the Air Force sought to arrogate to their Departments an authority in defining insanity which had previously been exercised by the President, and quite probably was intended by Congress to remain with the President.

ability. Accordingly, in its discussion of the notion of "irresistible impulse," the publication states that such a prompting constitutes no defense if it springs from a "character or behavior" disorder — and the latter principle was quoted approvingly by us in United States v. Trede, supra. The draftsmen of the 1950 Technical Manual appeared to consider that their pronouncements were implicit in the demarcation established in the 1949 Manual for Courts-Martial between "mental disease, defect, or derangement," on the one hand, and a "defect of character, will power, or behavior," on the other. Manual for Courts-Martial, U. S. Army, 1949, paragraph 110*b*. The correctness of this assumption seems *confined* by a repetition in the 1951 Manual for Courts-Martial of the verbiage used in this connection in the 1949 edition. See Manual for Courts-Martial, United States, 1951, paragraph 120*b*. Moreover the framers of the latter source — far from being unaware of the exposition presented in TM 8-240 — observe that the publication "contains a very good discussion of the whole subject of insanity in the sense we are using the term," and add "This pamphlet will guide both military lawyers and military psychiatrists along the lines of the approved doctrines." Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 167.

The Technical Manual also conforms to the Joint Armed Forces Definitions of Psychiatric Conditions. The former source's interpretation of "defect of character, will power, or behavior" runs to the effect that "pathologic personality, constitutional psychopathy, psychopathic personality" and the like do not exempt from criminal responsibility. TM 8-240, paragraph 13*a*. The predecessor of TM 8-240 also observed that although "psychopaths are the group of psychiatric cases about whose mental accountability lawyers and psychiatrists have their chief disagreements," "psychopaths are generally held to be responsible for their acts," TB MED 201, supra, paragraph 4*d*. The Joint Armed Forces Definitions make clear that the generic group mentioned — that is, "character and behavior disorders" — includes those which theretofore had been termed "pathological personality" types, as well as types previously viewed as suffering from a "constitutional psychopathic state," or a "psychopathic personality." See SR 40-1025-2, paragraph 6.

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In discussing "irresistible impulse," TM 8-240 sets forth what has been referred to as the "policeman at the elbow" test. Paragraphs 5*a*, *c*. Under this test no irresistible impulse is present unless the offense would have been committed had a policeman been present at the time. According to appellate defense counsel, a too narrow test of irresistible impulse is thus provided. Moreover, they contend that the "policeman" test has been altered subsequently by the Army and Air Force. This claim derives from the fact that, in the

May 1953 edition of TM 8-240, the test for irresistible impulse is phrased in these terms: whether "the compulsion generating the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed." Paragraph 5*a*.

In light of our premise that the Secretaries of the Army and the Air Force may not alter the criteria of insanity set down by the President in the Manual for Courts-Martial and are without power to promulgate new rules for the determination of mental responsibility, we have searchingly examined the so-called "policeman" test. Perhaps the test originated in a remark by Lord Bramwell. See United States v. Kunak, supra. See also Royal Commission Report, paragraph 292. Even in jurisdictions applying only the McNaughten Rules—with their focus on knowledge of the act's wrongfulness—the effect of a hypothetical policeman at the elbow has been a frequent subject of inquiry. One well-known psychiatrist—apparently with considerable experience in forensic psychiatry in a McNaughten jurisdiction—writes of the question as "old as the hills but ever new: 'Would he have committed the crime if a policeman had been present?'" Wertham, The Show of Violence, 1949, page 155.[27] A legal commentator, too, seems to accept this as the test for irresistible impulse. Burdick, The Law of Crime, 1946, paragraph 243*b*. See also, Davidson, Forensic Psychiatry, 1952, page 13. But see Royal Commission Report, paragraph 319.

The Manual for Courts-Martial emphasizes that "to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also *completely* deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged."[28] Paragraph 120*b*. (Emphasis supplied.) Thus, mere *impairment* of the ability to adhere to the right does not constitute a defense, although it may form a mitigating circumstance. Paragraphs 120, 123. The emphasis on *complete* inability to adhere to the right renders it difficult to

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[27] Dr. Wertham was apparently referring chiefly to his experience in New York, a jurisdiction where irresistible impulse, as such, is not recognized as a defense—and where the question quoted by him was asked to probe into whether the accused could really distinguish between right and wrong at the time of the offense. Of course, it has been contended that a true irresistible impulse cannot coexist with full ability to distinguish right from wrong. See Hall, General Principles of Criminal Law, 1947, chapter 14; Weihofen, supra, page 96. In practice, in England there is some tendency to strain the McNaughten Rules so as to encompass this point of view. Royal Commission Report, paragraphs 227-8, 232-43, 270.

deem mentally irresponsible an accused person who would not have performed the act had there been an appreciable likelihood that he would be arrested and punished. Also, the fact that the Secretaries of the Army and Air Force considered this a correct exposition of the 1951 Manual for Courts-Martial and of the previous 1949 Manual which contained like wording is a persuasive circumstance.

We must concede that our willingness to accept a construction of complete inability to adhere to the right, focused on a hypothetical reaction to the prospect of detection, is heightened by the absence of any sort of suggested alternative interpretation.

109 It may be replied, of course, that the Manual's draftsmen did not intend that this "complete inability to adhere to the right" should possess a fixed meaning. If this be so, then the framers were redundant—for they would not have been required to include the additional test of ability to distinguish right from wrong. We doubt that one could be unable to distinguish right from wrong and at the same time able to adhere to that unrecognized right—although the converse could, of course, be true. Accordingly, we suspect that some refinement of the test of inability to adhere to the right was envisaged, and that there was no sort of purpose to leave it as an amorphous concept, which would in effect equate to the causation test laid down in the Durham case—and thus render the "knowledge of right and wrong" test superfluous.

Still another prop for an interpretation based on the effect of probable apprehension is derivable from one of the arguments used to support a greater liberalization of mental responsibility criteria. That argument runs to the effect that the usual jury may be expected to disregard limiting instructions from the judge, and to act as its members see fit in dealing with an insanity problem. If this premise is to be accepted, then one may inquire what finding a jury would be likely to return respecting the sanity of an accused who, it was established, knew right from wrong with reference to the offense charged and would have done the "right" thing, if he had anticipated detection and apprehension. We surmise that in virtually every such instance the jury would find sanity to exist. The point we are seeking to make is that such an individual as the accused in the imagined case shares qualities so characteristic of one thought of as "normal" that most laymen would—in the most catch-as-catch-can fashion—regard him as mentally responsible. And perhaps there is a certain amount of validity to this approach even for the psychiatrist: His body of learning tells us that monomania is a chimera, and that mental disease colors all aspects of personality, albeit with varying degrees of subtlety. The implicit converse, of course, would be that a "normalcy" in one sphere of per-

110 sonality would suggest normalcy in others. In short, a recognition by an accused that the law condemns certain activities, plus a willingness to obey the legal mandate when punishment is

in prospect betokens such a degree of normalcy as to require that he receive the punishment meted out to the "normal" criminal.

Moreover, there is a sufficient indicium of "normalcy" such as to suggest that punishment might have a therapeutic effect on the future behavior of the individual concerned. On the other hand, if psychiatrists testify that the accused would have done the questioned act despite the presence of a high risk of apprehension, the accused has given an indication that he is impervious to the penal sanctions of society—and thus it may be thought less probable that he would alter his behavior by reason of any punishment he may receive.

Furthermore, in establishing the criteria for mental responsibility, the military establishment must reckon with the widespread skepticism concerning irresistible impulse—especially in connection with serious offenses. For instance, Dr. Wertham comments that "There is with one exception no symptom in the whole field of psychopathology that would correspond to a really ungovernable or uncontrollable impulse. That exception is an obsessive—compulsive neurosis." He then asserts that "[C]ompulsions play no role in criminal acts," and therefore concludes that "It is therefore always bad psychopathology to speak of a compulsive murder or a compulsive suicide." The Show of Violence, supra, pages 13-4. Dr. Hopwood, the Superintendent of Broadmoor, expressed doubts with respect to the frequency of irresistible impulses associated with obsessive-compulsive psychoneurosis which produce anything beyond minor crime—although he conceded that "early schizophrenia may lead to an irresistible impulse, which may be one of the first overt signs of the disease." Royal Commission Minutes, Qs 4291-3. Cf. Royal Commission Minutes, Qs 3826-7. Dr. Yellowlees stated that "An irresistible impulse, in my judgment, does not occur except in the case of a person who has not known the nature and quality of his acts for several years." Royal Commission Minutes, Q 7354. But cf. Royal Commission Minutes, Q 2335. Sir Norwood East disputed especially the occurrence of cases involving "an irresistible impulse, apart from any other indication of mental disorder." Royal Commission Minutes, page 511, paragraph (24), Q 7033. Cf. Qs 2338-4264. See also Royal Commission Report, paragraph 270. Cf. Neustatter, Psychological Disorder and Crime, page 12.

With such skepticism prevalent among psychiatrists, it is understandable that public opinion would scarcely rally round a wholesale exculpation of "abnormal" persons by a widely-extended application of irresistible impulse. The witnesses before the Royal Commission attached weight to public opinion in connection with problems of penology—although they emphasized that in some areas it might be desirable to undertake attempts to change those opinions. See Royal Commission Minutes, Qs 4194, 4551-2, 6999-7000, 7588-91.

Cf. Royal Commission Minutes, Qs 6388-9. Absent some indication of contrary intent on the part of the draftsmen of the Manual for Courts-Martial, we are content to follow the same approach.

We observe, too, that penal action is, among other things, designed for the therapy and control of the individual punished. If the accused would have performed the reprehended act despite the prospect of apprehension, an indicium exists that he is impervious to punishment, and that there is but dim probability that as to him it will achieve a valuable rehabilitative result. Conversely, the person who—according to psychiatric testimony—would have been deterred from the act by the likelihood of detection would appear to offer better prospects of improved conduct following the imposition of punishment. Cf. Neustatter, Psychological Disorder and Crime, 1953, pages 230-1. The test voiced by TM 8-240 conforms to this differentiation.

It may then be asked whether this Court views as correct the test stated in the 1950 edition, or that found in the 1953 version, of TM 8-240. In the only important sense we deem each to be correct since, although differing somewhat in wording, they possess an identical core of meaning. That meaning simply has to do with whether the prospect of penal sanctions would have deterred the accused from the conduct in question—in short, whether punishment had significance for him as to that act. This is made clear in paragraph 5*c* of the 1950 Technical Manual, which states in explanation of the "policeman" test that "No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible.'" Unfortunately the wording of paragraph 5*a* of that same document with respect to the "policeman" test might, if taken alone, be construed in a slightly different manner—a circumstance which doubtless produced the clearer phraseology of the later edition of the Technical Manual.[29]

The basic difficulty is that which may arise from a too literal application of the "policeman" test.[30] Perhaps, indeed, the accused

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[29] The framers of the Manual for Courts-Martial, United States, 1951, also realized that the "policeman" test should be applied with discrimination. See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 167.

[30] The "policeman" test literally applied may even err in favor of an accused in a rare type of situation—one, for example, where a policeman was in fact present at the time of the act but the accused did not anticipate apprehension. A situation of this sort has already reached this Court's attention. There the accused gave a so-called "bad check" with a policeman standing beside him; but the policeman did not realize that the check was bad—and so there was little risk of apprehension to deter the accused.

would not have committed the offense in the company of a
112 policeman, or of anyone else for that matter, for the plain reason that he wished to act in private—this despite the fact that he nonetheless knew he would be apprehended forthwith. Perhaps, too, he would not have attempted the deed with a policeman at his elbow, because he feared that the policeman would halt him prior to its completion. Cf Davidson, Forensic Psychiatry, supra, page 8; Neustatter, supra, page 97. Also, perhaps the presence of a policeman would have served to make more vivid to his mind the prospect of ultimate apprehension and punishment. And perhaps, finally, the presence of the policeman would have exercised some other symbolic effect in precluding or delaying the commission of the offense—quite apart from the probability of detection and punishment arising from his presence. Cf MacNiven, Psychoses and Criminal Responsibility, Mental Abnormality and Crime, 1944, page 53.

These possibilities appear to be somewhat theoretical. Yet psychiatrists on occasion are prone to draw distinctions difficult for lawyers and judges to comprehend. In light of these, it is distinctly possible that the "policeman" test—literally applied—may mislead. Therefore, the wording of the 1953 edition of TM 8-240 should be utilized as a guide for instructions and the like. Indeed, in a case in which it is clear that the trial was premised on an erroneous, overly literalistic construction of the "policeman" test, as phrased in the 1950 Technical Manual, we might well be compelled to reverse. On the other hand, in the absence of an overt showing that the test was construed to mean other than it does—namely whether the accused would have been deterred by a probability of apprehension and punishment—we are sure that reversal is not required. Compare United States v. Biesak, supra; United States v. Johnson, 3 USCMA 725, 14 CMR 143.

While dealing with the concept of "irresistible impulse," it may be desirable to comment on a matter which appeared to disturb the Court of Appeals for the District of Columbia in United States v. Durham, supra. The doctrine under scrutiny was by that court construed to mean no more than an impulse suddenly con-
113 ceived, and so to exclude a project which had been the subject of the brooding, even consideration, for some time. For example, under the notion of irresistible impulse as there interpreted, one suffering from melancholia who—after weeks of reflection[31]—commits a murder should not be held criminally insane. The narrowness of the scope of "irresistible impulse"—as thus construed—was advanced as a reason for adopting the new criteria

[31] As might be the case in infanticide, "mercy killing," or the execution of a suicide pact.

for criminal responsibility expressed in Durham. For the military establishment, however, there is no sort of requirement that the mental disease which leads to inability to adhere to the right be precipitate in origin. As a matter of fact, Technical Manual 8-240 in paragraph 5*a* cautions the examiner to beware of a claimed "irresistible impulse" unaccompanied by an appropriate history of prior mental disease. Thus, so far as military law is concerned, we find no worries concerning the existing rule of the nature of those which plagued the Court of Appeals. Cf. State v. White, 38 NM 324, 270 P. 2d 727. We may add that, in our view, the phrase "irresistible impulse" should, for safety's sake, be omitted wholly from instructions to a court-martial. Cf. Royal Commission Report, paragraph 314; Royal Commission Minutes, Q 4009.

VI.

At the trial the Government called numerous expert witnesses to establish that Mrs. Smith was mentally responsible at the time of the stabbing. One Captain Reilly, a neurologist, testified that an electroencephalogram, plus a detailed physical examination of the accused, revealed no indication of organic disease or defect of her central or peripheral nervous system. Thereafter there appeared a Colonel Hessin, Chief of the Neuropsychiatric Service at the medical facility in which Mrs. Smith had been hospitalized prior to trial. The Colonel stated that he had treated Mrs. Smith in April and May 1952, and later had sat as president of a sanity board which sought to evaluate her mental condition after the slaying. He also testified—without objection—that the
114 board had determined unanimously that Dorothy K. Smith was legally sane when she killed her husband, and had arrived at a diagnosis of:

> " . . . '1. Emotional instability reaction, chronic, severe, manifested by extreme emotional outbursts and suicidal and homicidal manifestations. Predisposition, severe (numerous previous hospitalizations for similar disorder); stress, minimal (recent arrival in the Far East Command); incapacity, minimal. 2. Intoxication, drug, barbiturate and paraldehyde (terminated 4 October 1952). 3. Addiction, drug (barbiturate).
>
> These diagnoses were accepted by the Board.' "

According to Colonel Hessin, this diagnosis revealed only a behavior disorder and not a mental defect, disease, or derangement. He stated that only at one point did the accused's past record reflect a diagnosis of any condition which might possibly be deemed

a mental disease.[32] In the course of cross-examination the defense caused the witness to identify various medical records of Mrs. Smith, and thereafter introduced them in evidence.

After the defense had introduced evidence of insanity, the Government called in rebuttal Major Henry Segal, a psychiatrist who had seen the accused at 8:00 o'clock on the morning of October 4, 1952 only a few hours after the killing. Major Segal testified that as a member of the sanity board he had concurred in its conclusions, which—again without objection—he described as unanimous. His opinion was that the accused had been, at the time of the offense, able to distinguish right from wrong and to adhere to the right. He did not believe that she was moved by an irresistible impulse—this because he did not find that she was suffering from a mental defect, disease, or derangement. He affirmed, 115 without defense objection, that he was familiar with the language of TM 8-240, paragraph 5*a*, to the effect that irresistible impulse should not "be used to exculpate aggressive character or behavior disorders"[33]—and stated that he "concurred" in the phrasing of the Technical Manual in this particular. Major Segal also explained his reasons for discounting the possibility that Mrs. Smith suffered from a psychosis due to drug intoxication at the time of the act.

The accused's defense of insanity centered on testimony given by

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[32] "Q. In your examination of Mrs. Smith, Colonel, did you and the board find any evidence of any mental defect, disease or derangement on the part of the accused?

"A. I think at one point in the series of diagnoses made in the past medical records there was one diagnosis of anxiety reaction.

"Q. Is anxiety reaction, as such, a mental disease, defect or derangement?

"A. It could be classified under disease.

"Q. Under a mental disease?

"A. Mental disease."

[33] In the course of a question, the following was quoted to Major Segal by the trial counsel without defense objection:

> "'The adhere to the right or irresistible impulse doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetrated because of those sick minds.'"

See also United States v. Trade, 2 USCMA 581, 10 CMR 79.

Brigadier General Rawley E. Chambers, United States Army Chief of the Division of Psychiatry and Neurology, under whose care Mrs. Smith had been at various times from 1948 to 1951. Chiefly on the basis of her history while his patient, General Chambers believed that Mrs. Smith—while able to distinguish right from wrong—could not adhere to the right at the time of the offense. According to this expert, had a uniformed police officer been in her presence at the time of the slaying, it would not have caused the accused to restrain herself. On cross-examination General Chambers stated that at various times he

> "... had considered her [the accused] as an anxiety neurosis but as the picture began to unfold, it is a long-standing pattern and continual struggle with these various episodes, and the final diagnosis, as I recall, was emotional instability reaction with barbituate addiction."

The General contended that Mrs. Smith suffered from a mental defect, disease or derangement. Trial counsel then directed the witness' attention to TM 8-240, paragraph 13, in which it is stated that character and behavior disorders do not constitute a
116 defense to crime—and the General conceded that some of Mrs. Smith's outbursts did constitute evidence of a character or behavior disorder.[34] At a later point in the cross-examination, General Chambers was requested by trial counsel to utilize "the terms that are contained in the Manual for Courts-Martial and also in TM 8-240, 'Psychiatry in Military Law.'" The General indicated that this was agreeable to him. Thereupon defense counsel commented that to require a medical witness "to express his thoughts in legal vocabulary" would not be "consistent with his training or with his ideas in this case." After further explanation by the trial counsel of his assigned purpose—that is, to facilitate disposition of the issue of legal responsibility—the law officer commented:

> "LAW OFFICER: The trial counsel's question calls for the witness to answer as fully as he understands the Manual and the Technical Manual. I am sure that the witness is capable of explaining any further departure that has been mentioned by defense. Objection overruled."

[34] "Q. Thank you, sir. Now, these violent outbursts, these drinking sprees, these superficial suicidal attempts, on the part of Mrs. Smith over a period of many months, in your opinion today, General Chambers, are they behavior characteristics of mental characteristics?

"A. The definition—they are by definition, character and behavior disorders."

No further comment or objection was presented by the defense in this particular.

General Chambers then testified that the accused was in his opinion suffering from a "toxic psychosis" at the time of the stabbing. The witness later conceded that, "with minor deviations," he was "in complete accord" with the diagnosis of the sanity board. Apparently the chief "deviation" lay in the fact that General Chambers believed that "acute drug intoxication" existed at the moment of the offense.

VII

The defense complains because of the fact that TM 8-240 was used in the cross-examination of General Chambers, as well as in the direct examination of prosecution witnesses. The Manual for Courts-Martial states that the "regulations and official publications" issued by the Department of Defense, or the several departments thereunder, may be noticed judicially—including "general orders, bulletins, circulars, price lists, and court-martial orders." Paragraph 147*a*. It strikes us that a Technical Manual jointly published by the Army and the Air Force clearly falls within the purview of this provision:

We detect no violation of the Code in this authorization of judicial notice. To be sure, a type of hearsay is involved. At the same time, we find nothing amiss in permitting a court-martial to enjoy the benefit of information compiled by the military establishment and carefully prepared with special reference to military problems. As to a matter of psychiatric learning, certainly no witness could be controlled by anything contained in TM 8-240—and we would hardly anticipate that a court-martial would feel itself bound in any respect. Moreover, on a controverted medical point, the defense would be perfectly free to introduce its own evidence—and as to any expression of views on points of law, this Court can, of course, review for error and for possible prejudice therefrom.

While we acknowledge that civilian courts have refused to permit the contents of text books to be brought to a court's attention, we would surmise that, to an appreciable extent, this doctrine reflects a sound recognition that under any other rule it would be difficult for a judge to distinguish between those treatises which are to be received in evidence, or noticed by a court, and those which are not. For military law there is no such problem of "drawing the line," since the distinction is ready-made as between, on the one hand, "official" publications stemming from units and commands under the Department of Defense, and, on the other, unofficial documents. In reality the problem is little different from that found in United States v. White, 3 USCMA 666, 14 CMR 84, where we upheld the admissibility of a certificate of fingerprint identification, prepared in accordance with the Manual for Courts-Martial, paragraph

143*a*. That Manual provision dispensed with the need to
118 call an expert witness for the purpose of testifying to the results of fingerprint comparison. As was emphasized at the time, this practice in no way operated to deprive the defense of the right to contravene the evidence of identification contained in the permitted certificate. To notice judicially the contents of TM 8-240 would certainly serve to place before the court the conclusions on certain general psychiatric matters of those experts in the Office of the Surgeon General who had assisted in the preparation of the Technical Manual. But the accused—just as in White—could contest the assertions of these experts, and the court-martial could then elect between conflicting views. The standards of competence and accuracy reflected in the technical publications of the Armed Services are sufficiently high to cause us to doubt that an accused will suffer from having their contents noted by the members of a court-martial. This presumably was also the view of the draftsmen of the Manual for Courts-Martial.

Since we conclude that the Technical Manual might properly have been noticed judicially by the court-martial, we do not doubt that it could with equal propriety be utilized for cross-examination purposes. This seems particularly evident when—as here—the portions read to the court during the course of the direct and cross-examinations enunciated an entirely correct interpretation of the law applicable to the case at bar.[35] The doubt voiced on one occasion by the defense counsel concerning the use of TM 8-240 scarcely involved an "objection" in any proper sense of the term, and, in light of the entire record, does not present an issue on appeal.
119 Cf. United States v. Johnson, 318 US 189. At that time, to, the law officer made it clear that the witness was not to be limited by the phraseology of the Technical Manual in the presenta-

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[35] The portions of the Technical Manual utilized in the cross-examination of General Chambers and during the direct examination of Major Segal were those dealing with the distinction between mental defect, disease, or derangement, on the one hand, and character or behavior disorders, on the other. On these matters TM 8-240 sets forth a correct interpretation of the military rules dealing with insanity prescribed in the Manual for Courts-Martial—when read within the context of the Joint Definitions of the Armed Forces promulgated in SR 40-1025-2. The "policeman" test only entered the picture prior to instructions and via the testimony of General Chambers on direct examination to the effect that the accused could not have adhered to the right although a policeman had been at her elbow.

tion of his medical testimony.[36] The defense, however, made
120 no effort later in the trial to have General Chambers elaborate any matters as to which he considered the Technical Manual to have hindered his testimony.

The law officer instructed the court-martial—undoubtedly on the basis of TM 8-240—to the effect that "If the accused would not have committed the act had there been a military or civilian policeman present she can not be said to have acted under an irresistible impulse." As previously suggested, it is undeniable that such a test may—in some instances and under certain constructions—be misleading. However, this abstract possibility of ambiguity signifies nothing more in the case before us than that a proper defense instruction for clarification of the "policeman" test should, if requested, have been granted. There is absolutely nothing in the record of trial to suggest that a distinction was drawn by anyone between a situation involving a high probability of apprehension,

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[36] In its entirety the incident was as follows:

"Questions by prosecution:

"Q. General Chambers, continuing the cross examination, I would like first this morning to ask you, please, to use the terms, if you will, in describing the conditions and emotions of this accused, the terms that are contained in the Manual for Courts-Martial and also in TM 8-240, 'Psychiatry in Military Law.' I make that request for the purpose of keeping as much confusion as possible out of the record. Is that agreeable?

"A. Yes, sir.

"DEFENSE (Brigadier General Richmond): May I make this comment, that the pamphlet which counsel had in his hand is a pamphlet entitled, 'Psychiatry and the Law.' We have known military law. We have two distinct vocabularies, one legal, one medical. What this pamphlet is trying to do is superimpose the medical vocabulary upon the legal vocabulary and the two particulars do not exactly fit. The words used by the legal have one connotation, and the words used by the medical have another connotation. The difficulty is harminizing those two means so that we might understand. Now, to request a medical officer to confine his language to legal vocabulary is extremely difficult, the same as it would be for a lawyer to express his thoughts in medical terms, and it is that position that I wish to bring to the court's attention. Counsel is requesting a medical witness to express his thoughts in legal vocabulary, which I do not think is consistent with his training or with his ideas in this case.

"PROSECUTION: I wish to comment for the record that it is familiar to all of us that the problem which faces this court is

detection, and punishment, on the one hand, and that which would have existed had a policeman been physically present, on the other. The latter hypothesis—it seems perfectly clear—was only taken as illustrative of the former.

Moreover, the real issue at the trial was simply one of whether Mrs. Smith suffered from a "mental defect, disease, or derangement," within the meaning of the Manual for Courts-Martial. General Chambers testified in her behalf, and to the effect that she was suffering from a mental disease—namely a toxic psychosis—at the time of the homicide, and that her conduct would have
121 been no different had a policeman been present. The cross-examination of this witness centered on the existence of "mental disease," within the 1951 Manual's meaning. The Government's witnesses rested their conclusion of sanity on the premise

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the legal responsibility and accountability of this accused. My only purpose in asking the witness, if possible, to limit himself to these terms with which, as Chief of Psychiatry of the United States Army, I am sure he is thoroughly familiar, and I believe is a a [sic] reasonable request.

"LAW OFFICER: The trial counsel's question calls for the witness to answer as fully as he understands the Manual and the Technical Manual. I am sure that the witness is capable of explaining any further departure that has been mentioned by defense. Objection overruled."

To put the matter in perspective more fully, it should be observed that the trial counsel was seeking to elicit from General Chambers a distinction between mental defect, disease, or derangement, on the one hand, and character and behavior disorders, on the other. This witness, as noted in the text, had diagnosed Mrs. Smith as suffering *from* "emotional instability reaction," although he had at one time inclined an "anxiety neurosis" diagnosis. The sanity board also diagnosed the accused as suffering from "emotional instability reaction." The Joint Definitions of the Armed Forces place this psychiatric state under the head of character and behavior disorders, and apparently equate it to one type of psychopathy, which is generally considered ot constitute a character and behavior disorder. See SR 40-1025-2, paragraph 6*b*(1). Under these circumstances trial counsel was thoroughly justified in inquiring of General Chambers, the Army Chief of Psychiatry, how he reached the conclusion stated during his direct examination—at page 299 of the record—that Mrs. Smith was not so free from mental defect, disease, or derangement as to have "any ability to adhere to the right at that time," that is, at the time of the offense charged. The law officer did not unduly box the defense, yet he permitted trial counsel to go into this matter. Therefore, his ruling was correct.

that no mental defect, disease, or derangement existed. They found no toxic psychosis. Their primary diagnosis of "emotional instability reaction" is one which manifestly classified as a character or behavior disorder, within the meaning (1) of the Manual for Courts-Martial, (2) of TM 8-240, and (3) of the Joint Armed Forces Definitions. The last-mentioned publication points out specifically that this diagnosis "is synonymous with the former term 'psychopathic personality' with emotional instability."

Indeed, as the case reached the members of the court-martial, it is almost inconceivable that they could have accepted General Chambers' assertion that the accused suffered from a mental disease, within the legal meaning of the term, and yet have concluded that she was able to adhere to the right. Even more improbable is the prospect that the court drew any sort of distinction with respect to the physical presence of a policeman—or viewed the "policeman" test as other than one which graphically embodied the test of whether the accused would have been deterred by the prospect of punishment. After examining the issues as they were framed at the trial, together with the remainder of the instructions, we are sure that the use of the "policeman" test could not have harmed the accused in any manner.

VIII

The defense claims that reversible error inhered in the denial of a requested instruction:

> "The members of the court are instructed that if they believe from the evidence that at the time of committing the act charged in the specification the accused was suffering from such a perverted and deranged condition of her mental faculties as rendered her incapable of distinguishing between right and wrong, or unconscious at such time of the nature of the act charged in the specification while committing the same, or where, though conscious of such act and able to distinguish between right and wrong, and to know that the act was wrong,
> 122 yet her will, the governing power of her mind, was so completely destroyed that her action was not subject to it but was beyond her control, then you must find the accused not guilty of the specification and the charge."

The denial of such an instruction was—they point out—the basis for reversal in Smith v. United States, 36 F. 2d 548 (CA DC Cir). However, in that case the instructions given by the judge completely ignored the possibility of "irresistible impulse"—as to which there was at the time evidence before the jury. *This* was the reason for reversal.

Here, on the other hand, the law officer had informed the court explicitly that an inability to adhere to the right, as well as an

incapacity to distinguish right from wrong would compel acquittal. While we have conceded that the phrasing used in the presentation of the "policeman" test contained possible ambiguity, we do not at all interpret the requested charge as designed in any measure to clarify *that* ambiguity. Cf. United States v. Boykins, 3 USCMA 806, 14 CMR 224. Further, the phrase in the requested instruction having to do with being "unconscious at any time of the *nature of the act*," charged in the specification, might have appeared to the members of the court-martial to introduce a third test of mental responsibility—that is, one in addition to (1) ability to distinguish right from wrong as to the particular acts charged and (2) ability to adhere to the right concerning those acts. (Emphasis supplied.) Of course, reference is here made to a possible requirement of knowledge of the "nature and quality" of the act performed by the accused.

The McNaughten Rules, as originally stated and as applied in many jurisdictions, would suggest the existence of this third criterion. However, the Manual does not authorize it—with the result that it furnishes no basis for a requested instruction. When an attempt is made to extract a kernel of meaning from the phrase "nature and quality" of the act, the effort is reduced to the following questions: whether (1) the accused knew what he was doing, (2) knew that it was wrong, and (3) knew that it was punishable. Several hypothetical problems may point up possible differences between this standard and those found in military law.

123 For instance, let us suppose that an accused, by reason of mental disease, believed himself to be caressing another when in reality he was strangling the latter to death. Rather clearly he would not have been aware of the nature of this act in one sense of the term—and by some interpretations might therefore qualify for acquittal under the McNaughten Rules. Whether he would similarly qualify under the military rule would depend, of course, on whether he recognized as being wrong the act he believed himself to be performing. Thus in the example suggested, if he believed the caress to be wrong, he would be responsible. His responsibility would, however, be no more than partial, since necessarily he would not have been able to premeditate—and thus would not be subject to conviction from premeditated murder.

If the accused had failed to know that the act he was performing was punishable, then he could not have been deterred by fear of punishment. Therefore, under military law, he could not have adhered to the right—and was mentally irresponsible. Thus, the result would be as liberal as any possible under an interpretation of the McNaughten phrase having to do with knowledge of the "nature and quality" of an act. However, what if the accused

knew that he would be punished for the act, knew that it was wrong according to law, yet considered his conduct to be right morally? It might be argued in such an instance that he was wanting in knowledge of the "nature and quality" of his act—and thus was irresponsible. However, as the rules of mental responsibility are set down in the Manual for Courts-Martial, we do not believe that the contrast between "right" and "wrong" was meant to extend beyond that which is recognized as right or wrong by law. An accused's notion that an act is morally right, although he realizes its legal wrongfulness, does not constitute a defense. Here, then, a difference may exist between the approach of military law and that applied in certain civilian courts. In practice, however, we suspect that the ultimate results will frequently be identical under both systems. For example,
124 the prospect of punishment may often fail to deter one who feels impelled to transgress the law because of some high moral purpose—so that inability to adhere to the right will be present. Similarly an individual afflicted with severe delusions of persecution will but rarely be deterred by punitive prospects from attacking his supposed tormentors. Moreover, we are genuinely inclined to doubt the frequent existence of psychiatric ills by reason of which the individual affected recognizes an act to be legally wrong, but deems it justified by some lofty ethical purpose.

The fundamental point here is that in courts-martial a reference to knowledge of the "nature" or the "consequences" of acts can only be confusing. We are sure that the law officer is not obliged to introduce this complication into the trial—even following a defense request. When we consider the generality and involution of the instruction requested, we cannot see that it would have clarified the extensive instructions otherwise supplied at the trial, or would have added aught in the nature of enlightenment. Nor are we able to perceive any phase of the subject, not otherwise the subject of adequate instructions, concerning which the law officer was put on notice by the defense request. Accordingly, we are sure that he was well within his rights in denying the additional charge requested by the defense. United States v. Boykins, supra.

IX

The defense is certain that error was committed when trial counsel, over objection, was permitted to read, during his closing argument, an extensive extract from the testimony of General Chambers. There is no issue concerning the accuracy of the transcript read. Accordingly, no error was committed—for the law officer possessed discretion to permit such a reading of testimony. United States v. Chiarella, 184 F 2d 903 (CA 2d Cir.

In the case before us General Chambers was the mainstay of the defense. The prosecution appears to have considered that its cross-examination had destroyed completely the value
125 of his testimony. We cannot possibly find cause for complaint on the part of the defense arising from the fact that trial counsel wished the members of the court to deliberate with the testimony of the defense's star witness fresh in their ears. Especially is this true since the law officer informed the defense that if, in the reading of the transcript, "the prosecution brings out here new matter that is inappropriate to a closing argument, you may be heard on that later on." However, no further action was taken by the lawyers for the accused.

X

Error is also claimed because the trial counsel, in his examination of Government witnesses, brought out that the report of the sanity board had been unanimous—and later adverted to that circumstance in argument. The short answer to this proposal is that the defense wholly failed to object—either to the testimony now in question or to the reference to the matter in argument. However, a like contention is made with respect to a petition for new trial, which in part relies on what is appraised as a conscious suppression of evidence by the prosecution. The predicate for this latter petition is an affidavit of Captain William E. Mayer, a psychiatrist and a member of the sanity board—but one not used by trial counsel as a witness. The defense maintains that he was not called because the Government well knew that he did not agree with the conclusions of the board. Accordingly, they insist that the frequent references at the trial to the "unanimous" conclusions of the body were peculiarly noxious.

Captain Mayer now says that he signed the report because he believed that the conclusions set down therein "met the requirements contained in TM 8-240, 'Psychiatry in Military Law.'" He adds that if the same questions relating to Mrs. Smith's mental responsibility ha. been propounded to him "in civilian practice, where I was not subject to the limitations imposed by the cited technical manual, I would not have concurred fully in the conclusions reached by the Board, particularly in regard to Mrs. Smith's ability to adhere to the right." According to him "from a *purely medical* point of view," Mrs. Smith was suffering
126 from a "mental defect, disease, or derangement." (Emphasis supplied.) And from the same point of view her ability to adhere to the right was "*impaired*." (Emphasis supplied.) Captain Mayer deposes that he concurred in the conclusions reached by the board because "I believed it quite possible that the presence of a policeman, or of any other person, might, *to a*

certain extent, have acted as a deterrent to Mrs. Smith's actions on the night in question. I believe that Mrs. Smith would have *struck* her husband even if a policeman had been present. I do not believe that she would have consciously *stabbed* him to death under those circumstances." (Emphasis supplied.)

As we analyze this affidavit, Captain Mayer simply indicates that he dislikes the standards of military law with respect to mental responsibility.[37] Further, Captain Mayer was careful to say that he was speaking "from a purely medical point of view." Perhaps this signifies recognition on his part that law and penology must sometimes move beyond considerations which might be involved in the treatment of a single patient. In any event, military and other law must transcend the "purely medical" within this sphere. Captain Mayer speaks consistently of "impaired" ability to adhere to the right. It is distinctly unclear whether he has at any time deemed Mrs. Smith to have been "*completely* deprived" of her ability to adhere to the right when she killed her husband. See Manual for Courts-Martial, supra, paragraph 120*b*. (Emphasis supplied.) His comments on the "policeman" test in the present context signify little more than that he may have been too literal in his understanding and application thereof. In result, Captain Mayer's distinction between striking and stabbing her husband had a policeman been present suggests in fact that as to the murder charged, Mrs. Smith did *not* lack mental responsibility. Moreover, the Captain has never repudiated
127 the diagnosis of Mrs. Smith as a sufferer from "emotional instability reaction." We have earlier emphasized that, prima facie at least, this diagnosis reveals only a character and behavior disorder, rather than a mental disease producing irresponsibility.

In any event, and although trial counsel had conversed with Captain Mayer prior to the trial, no slightest showing of a conscious suppression of evidence is made. The affidavit of defense counsel in support of the petition for new trial indicates clearly that the members of the sanity board were available to him for consultation. In fact, one of the members of the defense staff was present at the time certain of the board's members signed their report.[38] He argues that trial counsel should have informed him that Captain Mayer had reservations relating to the report he had signed.

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[37] Captain Mayer might be still more dissatisfied with the standards of those civilian jurisdictions—far and away the majority—which do not recognize "irresistible impulse" as a defense.

[38] The accused was defended by two competent and experienced lawyers, one of them a distinguished retired brigadier general who had held high posts as a judge advocate officer.

In our convinced opinion, those reservations—as voiced in the latter's carefully phrased affidavit—are in no way so clear as to create any sort of duty on the part of trial counsel to make disclosure of his opposite number.[39] Since Captain Mayer—and every other member of the sanity board—had signed the report indicating that Dorothy K. Smith was sane, we find no prejudicial misrepresentation involved in the trial counsel's adducing testimony to the effect that the report had been unanimous, and thereafter in commenting on that circumstance in argument. By interposing an objection on hearsay grounds to testimony that the report of the sanity board was unanimous, the defense could have compelled the Government to call Captain Mayer—if the
128 prosecution's personnel wished to place the circumstance of unanimity before the court-martial. Not having utilized this ground for valid objection, the defense has no just cause for complaint.[40]

XI.

The court was specifically instructed by the law officer that: "If, in the light of all the evidence, the court has a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill which is involvd in the offense of premeditated murder, the court must find her not guilty of that offense." This instruction adequately informed the court of the possibility of partial responsibility—and a consequent finding of unpremeditated murder.[41] Thus, no error inheres in the *finding* of premeditated murder. Cf. United States v. Kunak, supra.

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[39] The trial counsel and assistant trial counsel explain in affidavits that they did not call Captain Mayer because they considered his testimony cumulative, and not because of a desire to suppress evidence. Perhaps, too, they did believe that he would not be so forceful or convincing a witness as Colonel Hessin or Major Segal. Yet, even so, there was no error, nor want of ethics, in failing to call this witness—who was equally available to the defense.

[40] Defense counsel may have chosen to refrain from objecting to the references to the "unanimous" report of the sanity board because they anticipated that the prosecution would then call *all* members of the board as witnesses.

[41] Military law and that declared by the Court of Appeals for the District of Columbia are completely out of phase. That Court has adopted a distinctly liberal approach to total mental irresponsibility, but has reaffirmed its refusal to accept the doctrine of partial responsibility. See Stewart v. United States, 214 F. 2d 879; Fisher v. United States, 149 F. 2d 28, aff'd 328 US 463. We, on the other hand, recognize that mental capacity can be wanting to a degree which will not exculpate entirely, but which will lessen the

degree of the offense. See United States v. Kunak, supra.

However, subsequent to the trial a civilian psychiatrist, a civilian clinical psychologist, and three military psychiatrists had occasion to observe Mrs. Smith following her transfer to the United States as a prisoner. Any conflict in their views concerning the accused's sanity at the time of the offense has been resolved against her by the board of review—and we find no reason to disturb the conclusion of its members on this point.[42] The experts who ex-
129 amined Mrs. Smith after the court-martial hearing were doubtful of her ability to "premeditate" at the time of the defense. The board of review weighed this new evidence, but nevertheless concluded that premeditation had existed. Since this Court lacks the power to determine the weight of the evidence, even as to the issue of sanity, we are without authority to disturb the board's determination—regardless of whether we might have reached an opposite conclusion.

XII

Accordingly the decision of the board of review must be affirmed.

Judge LATIMER concurs.

QUINN, Chief Judge (dissenting):

I dissent.

Apart from regarding the elaborate discussion on mental responsibility and the opinion of the United States Court of Appeals for the District of Columbia in United States v. Durham, 214 F. 2d 862 (1954), as unnecessary to the decision of this case (See United States v. Kunak, 5 USCMA— —, 17 CMR——), I strongly disa-

[42] As matters now stand the views expressed with respect to Mrs. Smith's sanity cover the entire spectrum. The Army sanity board set up prior to the court-martial hearing, and another convened subsequent to trial, considered that at the time of the offense the accused was so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong with respect to the act charged, and to adhere to the right. General Chambers, Army Chief of Psychiatry, thought that she could distinguish right from wrong, but that she could not, at the time of the offense adhere to the right by reason of a toxic condition. Certain civilian consultants later determined on an inability both to distinguish right from wrong, and to adhere to the right. Thus, it must be conceded that although military law seems more closely linked than other systems with specific psychiatric diagnoses, the area of disagreement among mental experts is still depressingly immense. When they become less so, it is time to consider an adoption of the Durham rule.

gree with substantial parts of it. However, I need not recite all the particulars of my disagreement because I find here, as I did in United States v. Kunak, supra, an improper use of the technical manual, TM 8-240, "Psychiatry in Military Law."

Mention of the technical manual first occurs in the cross-examination of Brigadier General R. E. Chambers, Chief of the Division of Psychiatry and Neurology, Office of the Surgeon General, United States Army. General Chambers testified for the defense.

At various times in a period of years preceding the offense,
130 he had the accused under his medical care. He also examined the medical data respecting the accused that had been obtained shortly before and after the crime. In his opinion, the accused could not adhere to the right at the time of the commission of the offense. Attempting to undermine this opinion, the prosecution sought to limit General Chambers to a statement of his medical opinion, in terms of the definitions of mental disorders enumerated in the technical manual. Later, a prosecution rebuttal witness, Major H. A. Segal, one of the members of a medical board of officers which examined the accused before the trial was similarly circumscribed in his testimony. This appears very clearly in the following excerpt from his direct testimony:

> "Q. In your opinion, does the accused now suffer or did she suffer on the night of 3-4 October with any mental defect, disease, or derangement as defined by TM 8-240?
>
> "A. Under the definition of TM 8-240, it is my opinion that she did not and does not suffer from any mental disease, defect, or derangement."

It also appears that Captain W. E. Mayer, a member of the same medical examining board as Major Segal, signed the medical report, which was frequently referred to at the trial, because he believed that:

> " . . . the conclusions therein set forth met the requirements contained in TM 8-240, 'Psychiatry in Military Law.' If the same questions relating to Mrs. Smith's mental responsibility had been propounded to me in civilian practice, where I was not subject to the limitations imposed by the cited technical manual, I would not have concurred fully in the conclusions reached by the Board, particularly in regard to Mrs. Smith's ability to adhere to the right.
>
> "4. I am of the opinion and believe that, from a purely medical point of view, at the time of the alleged offense Mrs. Smith was suffering from a 'mental defect, disease, or derangement.' I am of the opinion and believe that at the time of the alleged offense Mrs. Smith was incapable of setting out to kill her husband in a calculated, premeditated way. I am of the

opinion and believe that, from a purely medical point of view, at the time of the alleged offense Mrs. Smith's ability to adhere to the right was impaired."

131 This showing is supplemented by a statement in the report of the second board of medical officers, which was submitted to the board of review in connection with its reconsideration of the case. The statement reads as follows:

"Records of examinations conducted by two expert consultants to the Surgeon General, one in Psychiatry and one in Clinical Psychology, are attached to this report as an exhibit. Both are on the visiting staff for the Neuropsychiatric Service, Letterman Army Hospital. It is believed that it is pertinent to note here that Dr. Alexander Simon is a nationally known psychiatrist and at present is Professor of Psychiatry, University of California Medical School, San Francisco, California. Dr. Douglas M. Kelley is widely known in Psychiatry, considered an authority on the Rorschach psychological procedures and has had considerable experience in the medico-legal field. At present, Dr. Kelley is Professor of Criminology at the University of California, Berkeley, California.[1]

"The medical officers who have examined Mrs. Smith and whose names will be signed to these findings, function in a somewhat differently structured medico-legal context than their civilian colleagues who have also examined the accused. By this, it is inferred that the military psychiatrists latitude is in effect, somewhat diminished as to what findings he may make by the established body of medico-legal policy and precedent now codified in part in TM 8-240. It is the impression of the undersigned that in a civilian jurisdiction a much more liberal interpretation of issues of mental responsibility in crimes of violence is frequently observed. These statements are made in an attempt to explain some of the differences of opinion as to the accused's responsibility expressed by military and civilian psychiatrists."

From the record, it is distinctly evident that the prosecution's expert witnesses did not testify according to convictions based upon their own knowledge and medical experience, but in accordance with strictures of the technical manual. It matters not that the manual may have been intended for instructional purposes only. Clearly, the medical experts considered themselves bound

[1] These consultants concluded that the accused, at the time of the offense, was not able to distinguish right from wrong or to adhere to the right.

by the manual's terms, to the exclusion of their individual professional beliefs. Under the circumstances, their testimony was so seriously compromised as to require, in the interest of justice, a rehearing. See my dissenting opinion in United States v. Kunak, supra.

132 Supreme Court of the United States

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 12, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is transferred to the summary calendar and assigned for argument with No. 701.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956

No. 713

In the Supreme Court of the United States

OCTOBER TERM, 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KRUEGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
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CITATIONS

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OCTOBER TERM, 1955

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NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KRUEGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of Nina Kinsella, Warden of the Federal Reformatory for Women at Alderson, West Virginia, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the above case pending in that court on the appeal of Walter Krueger, respondent herein.

OPINION BELOW

The opinion of the District Court has not yet been reported. A copy is annexed hereto as Appendix A.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus was entered

on February 2, 1956 (Appendix A, *infra*, p. 9). A notice of appeal to the Court of Appeals for the Fourth Circuit was filed on February 6, 1956, and the appeal was docketed in that court on February 21, 1956. The case has not been heard, submitted to, or decided by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Congress has power under the Constitution to confer jurisdiction on a court-martial to try a dependent wife of a member of the United States Army, residing in quarters provided by the Army in Tokyo, Japan, where her husband was stationed, for the crime of murdering her husband in Japan.

STATUTE INVOLVED

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

> § 552 PERSONS SUBJECT TO THIS CHAPTER (Article 2)
>
> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accom-

panying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *.

STATEMENT

Mrs. Dorothy Krueger Smith was tried by a United States Army general court-martial convened in Tokyo, Japan, for the murder of her husband, a colonel in the United States Army, on or about October 4, 1952, at Tokyo, Japan. She was convicted and sentenced to life imprisonment. Her conviction was affirmed by the Board of Review (*United States* v. *Smith,* 10 CMR 350). On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity and to the jurisdiction of the general court-martial to try a dependent wife, the conviction was affirmed (*United States* v. *Smith,* 5 USCMA 314, 17 CMR 314).

In affirming the conviction, the Board of Review and the Court of Military Appeals held that Mrs. Smith was a person accompanying the armed forces without the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra.* It was established at the trial that Mrs. Smith and her dependent children had entered Japan upon

invitation of the United States Army, with the permission of the Japanese Government, solely as the dependent wife of a United States Army officer stationed there. Her transportation to Japan was accomplished by the Army. She and her husband were assigned quarters in "Washington Heights," a United States Army housing area in Tokyo. She was authorized to use, and did use, the facilities of the commissary, the post exchange and the dispensary which were maintained by the Army. The Board of Review also noted that at the time of the commission of the alleged offense there was in effect an Administrative Agreement under Article III of the Security Treaty Between the United States of America and Japan (Appendix B, *infra*, p. 23). Article XVII of the Administrative Agreement provided (*infra*, p. 33), with qualifications immaterial here, that "the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents * * *."

Following her conviction by the general court-martial in Japan, Mrs. Smith was confined in the Federal Reformatory for Women, Alderson, West Virginia. On December 9, 1955, her father, Lieutenant General Walter Krueger, U. S. Army, Retired, respondent here, filed a petition for a

writ of habeas corpus on her behalf in the United States District Court for the Southern District of West Virginia, directed to the warden of the prison where she is confined, praying for her release on the ground that the court-martial had lacked jurisdiction to try her. On February 2, 1956, the court entered an order discharging the writ and remanding Mrs. Smith to the custody of the warden. In its opinion, dated January 16, 1956, it ruled that the court-martial had jurisdiction to try Mrs. Smith under Article 2 (11) of the Uniform Code of Military Justice, and that the statute was within the competence of Congress to enact under Article 1, Section 8, clause 14, of the Constitution.

REASONS FOR GRANTING THE WRIT

The foregoing statement reveals that this case presents, on substantially parallel facts, the same constitutional issues as those raised by *Reid, Superintendent of the District of Columbia Jail* v. *Clarice B. Covert,* No. 701, now before this Court on direct appeal from the District Court for the District of Columbia. In that case the District Court, on its interpretation of this Court's decision in *Toth* v. *Quarles,* 350 U. S. 11, held that Article 2 (11) is unconstitutional—that Congress has no constitutional power to authorize the trial by court-martial of a dependent wife charged with the murder of her soldier husband on foreign soil. In the instant case the

District Court for the Southern District of West Virginia has upheld the constitutionality of Article 2 (11) as applied to a dependent wife who was tried by court-martial for the murder of her husband overseas. Since the decision adverse to constitutionality in the *Covert* case had to be brought to this Court by direct appeal under 28 U. S. C. 1252, it seems appropriate that the instant decision, raising the same issues on similar facts, be reviewed by this Court at the same time.*

The important question of the constitutionality of Article 2 (11) is directly presented by this case, without any possible complication which may arise in the *Covert* case from the fact that Mrs. Covert's conviction was set aside on review and a retrial by court-martial was ordered in the United States rather than in England. While we believe this additional factor in *Covert* to be immaterial to the ultimate decision (see our Statement as to Jurisdiction, p. 15), it has been pressed by the appellee there as a separate ground for denying court-martial jurisdiction.

As pointed out in our Statement as to Jurisdiction in the *Covert* case, it is important that the armed forces know, as quickly as possible, the

*It is clear, of course, that the party prevailing in the district court may seek certiorari before judgment in the Court of Appeals. See *United States* v. *United Mine Workers*, 330 U. S. 258, 269; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

extent of their jurisdiction over dependents who have accompanied the forces abroad. There are approximately 250,000 such dependents now living abroad in many foreign lands under the auspices of the armed forces, and the question of jurisdiction over them is one of great public importance. Cf. *Ex parte Quirin*, 317 U. S. 1, 19–20. Moreover, since the question is already here in the *Covert* case, this seems an appropriate occasion for the invocation of this Court's certiorari jurisdiction before judgment in the Court of Appeals. Cf. *White v. Mechanics Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *United States Shipping Board*, 280 U. S. 320, 324–325; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411–412, 415, n. 2; *United States* v. *Bankers' Trust Co.*, 294 U. S. 240, 243; *Porter* v. *Dicken*, 328 U. S. 252; *Brown* v. *Board of Education*, 344 U. S. 1, 3.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari before judgment should be granted.

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

FEBRUARY 1956.

376017—56——2

APPENDIX A

United States District Court
For the Southern District of West Virginia

Habeas Corpus No. 1726

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER *v.* NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA

John C. Morrison, Esq., Attorney at Law, 305 Morrison Building, Charleston 22, West Virginia; Frederick Bernays Wiener, Esq., Attorney at Law, 1023 Connecticut Avenue, NW., Washington 6, D. C.; Adam Richmond, Esq., Attorney at Law, 7816 Glenbrook Road, Bethesda, Maryland, for Relator.

Duncan W. Daugherty, United States Attorney; Percy H. Brown, Assistant United States Attorney; Lt. Colonel James W. Booth, JAGC, Judge Advocate General's Corps, United States Army; Lt. Colonel Cecil L. Forinash, JAGC, Judge Advocate General's Corps, United States Army, for Respondent.

BEN MOORE, *District Judge.*

OPINION

On January 10, 1953, Mrs. Dorothy Krueger Smith was convicted by a United States Army general court-martial, sitting in Tokyo, Japan, of the premeditated murder of her husband,

Colonel Aubrey D. Smith. The killing occurred on the night of October 3 or early morning of October 4, 1952, at the quarters occupied by the couple within the area of the Washington Heights Housing Project.

Mrs. Smith was sentenced to imprisonment for life. She appealed through all available military channels, but her conviction and sentence were finally affirmed by the Court of Military Appeals on December 30, 1954. She is now held as a prisoner in the Federal Reformatory for Women, a United States Government Penal Institution located at Alderson, in the Southern Judicial District of West Virginia. Her father, Lieutenant General Walter Krueger, U. S. Army, retired, filed a petition with this Court on December 9, 1955, praying for a writ of habeas corpus on her behalf, and for her release from imprisonment on the ground that the court-martial lacked jurisdiction to try her.

I awarded the preliminary writ, and on December 20, 1955, Mrs. Smith was brought into court at Charleston by the respondent, Nina Kinsella, Warden of the institution where she is confined. The only evidence, aside from the allegations and admissions in the petition and return, were the certified record of the entire proceedings in the military courts and boards, both trial and appellate, and a copy of the petition recently filed in the United States District Court for the District of Columbia in the case of *Clarice B. Covert* vs. *Curtis Reid, Superintendent of the District of Columbia jail.* Counsel were given unlimited time to present their arguments, as well as time

to file further briefs in addition to those submitted prior to the hearing.

It is pertinent to observe here that Brigadier General Onslow S. Rolfe, Commander of Headquarters and Service Command, Far East Command, detailed several officers from other commands to serve on the court-martial, among whom was Major General Joseph P. Sullivan. General Sullivan's service was with the concurrence of his commanding officer, Lieutenant General Mark Clark, Commander in Chief, Far East Command. All the other officers who were to sit on the court-martial were subordinate in rank to General Rolfe.

Mrs. Smith, who was represented at the trial and in all stages of her appeal by Brigadier General Adam Richmond, a retired officer of long legal and military experience, made no objection to the composition of the court-martial before any military court. The challenge is brought forth at this hearing for the first time.

In attacking the jurisdiction of the court-martial, petitioner advances two arguments:

1. That the court was illegally constituted, in that one of the officers who composed it was a Major General, whereas the convening officer was a Brigadier General;

2. That Mrs. Smith, being a civilian, was not subject to the Code of Military Justice, under the circumstances which prevailed at the time of the alleged offense and at the time of her trial.

The requirements for eligibility to sit as a member of a general court-martial are set out in Article 25 of the Uniform Code of Military Justice (50 U. S. C. 589) as follows:

> Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

There is thus no doubt that Major General Sullivan was eligible in the ordinary sense of the word, to serve as a member of a general court-martial. It is argued by counsel for petitioner that "eligibility" necessarily includes inferiority in rank to the convening officer; and that, since Brigadier General Rolfe, being subordinate in rank to Major General Sullivan, had no authority to order the latter to do anything, he could not therefore make him a member of a general court-martial.

At most, this argument turns on a mere technicality. It is not even pretended that Mrs. Smith suffered any disadvantage, or that her rights were in any way affected by the presence of Major General Sullivan as a member of the court-martial. Actually, General Sullivan was acting under the orders of his superior officer, General Mark Clark. The Manual for Courts-Martial provides for situations of this kind by the following language, (see Manual for Courts-Martial, subparagraph 4f).

> Appointment of members and law officers from other commands of the same armed force.—The convening authority may, with the concurrence of their proper commander, appoint as members of a court-martial * * * eligible persons of the same armed force who are not otherwise under his command. Concurrence of the proper

commander may be oral and need not be evidenced by the record of trial.

General Rolfe's convening of the court was an administrative, as distinguished from an operational command. In civil affairs, it would be regarded merely as an appointment, and it is so referred to in the above excerpt from the Manual for Courts-Martial. I can find nothing in the Code of Military Justice to indicate that in performing such a function distinctions of rank are important. Possibly General Sullivan might have had grounds based on seniority of rank for declining to sit on the court; possibly Mrs. Smith might have objected at the time to his sitting; but he having willingly acceded to the convening order, and she not having objected at any time to his sitting as a member of the court-martial, I hold that the objection to General Sullivan as a member of the court-martial, if there was a substantial objection, has been waived, and cannot now be raised. The applicable rule of decision is found in the case of *Swaim* v. *United States*, 165 U. S. 553, rather than in *McClaughry* v. *Deming*, 186 U. S. 49, relied on by petitioner.

Having concluded that the technical or procedural objection to the jurisdiction of the court-martial is without merit, I am forced to consider the constitutional question raised by the petitioner.

Counsel for petitioner very frankly says that the present effort to procure Mrs. Smith's release on this writ of habeas corpus stems from the recent decision of the United States Supreme Court in the case of *United States of America*,

ex rel., *Audrey M. Toth,* vs. *Donald A. Quarles, Secretary of the United States Air Force,* 76 Sup. Ct. 1 (1955), followed by the action of the District Court of the District of Columbia in freeing Mrs. Clarice Covert in circumstances very similar to those which surround Mrs. Smith. The *Covert* case has not yet been reported.

I think the *Toth* case is readily distinguishable. Toth was a civilian residing in the continental United States, who, at the time charges were made against him, had no connection with the armed forces. The decision in that case turned on the right of Toth to claim the protection of those Constitutional guaranties which secure to persons accused of crime in this country, except those who are in the land or naval forces, the traditional safeguards which accompany every criminal trial in the civil courts. Chief among these are the right to have the charge, if a felony, presented to a grand jury, the right to trial by jury, and to have these rights passed on by courts whose judges are a part of our Constitutional system of civil courts. Not all of these safeguards are or can be provided in a trial by court-martial.

In the *Covert* case the status of the petitioner was that of a person who, having been charged and convicted by a United States Army court-martial in a foreign land, was now within the borders of the United States, her conviction reversed, and she, no longer a follower of the army, merely awaiting trial on the original charge. Judge Tamm thought that under those circumstances the principle announced in the *Toth* case obliged him to grant her freedom pursuant to the

writ of habeas corpus. I do not think it necessary, because of the different circumstances in the case before me, either to adopt or reject his reasoning.

Mrs. Smith's situation differed from that of Toth in at least two significant respects:

(1) She was not living in the United States, nor present there when she was charged with the murder of her husband;

(2) She was connected with the army as a person "accompanying the armed forces without the continental limits of the United States;" both when she committed the act and when she was arrested and tried for it.

It may be useful at this point to examine the sections of Article 2 of the Code of Military Justice, "Title 50, U. S. C. A., § 552," which specify the conditions under which persons accompanying the armed forces may be tried by court-martial.

The pertinent sections of Article 2 read as follows:

> The following persons are subject to this (chapter):
>
> * * *
>
> (10) In time of war, all persons serving with or accompanying an armed force in the field;
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party, or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States.
>
> * * *

It is to be observed that Article 2 (10) gives unlimited court-martial jurisdiction over followers of the army in time of war and in the field. While it is not argued by counsel for petitioner that Article 2 (10) in any way exceeds the Constitutional power of Congress, it is proper, I think, to point out the distinctions drawn by Congress itself between Article 2 (10) and Article 2 (11).

The reason for such a broad grant of court-martial jurisdiction in time of war is obvious. It is essential that the operations of an army in the field be unobstructed by the acts of any person, whatever his status. Even if the Constitution were silent on the subject, military commanders in the field of war would nevertheless have the usual and necessary court-martial powers by virtue of the law of war itself. Congress having been granted in the Constitution the powers to "declare war" and to "raise and support armies," as well as to "make rules for the government and regulation of the land and naval forces," the last mentioned power, insofar as it is to operate in time of war, is referable to the others, and is co-extensive in scope with the law of war under which court-martial jurisdiction is permitted over certain classes of civilians. *Madsen* v. *Kinsella*, 343 U. S. 341 (1952).

Article 2 (11) is not limited to a time of war or to the field of action. It purports to extend the coverage of the Code of Military Justice (and hence the jurisdiction of courts-martial) to all persons "accompanying the armed forces" abroad. This coverage, however, is conditional. If some accepted rule of international law or the

terms of some treaty or agreement to which the United States is a party are applicable to a particular case, then by its own limitations Article 2 (11) does not come into play.

Now, it is a well recognized maxim of the law of nations that a citizen of one country who commits a local crime in another country is amenable to the laws of the latter. In the absence of a treaty he is entitled to claim no extra-territorial rights. If he believes himself to have been unfairly dealt with, his only recourse is through diplomatic channels. From this maxim flows the principle, recognized by the Supreme Court in the case of *In re Ross,* 140 U. S. 453 (1891), and never repudiated in any case that I have found, that the United States Constitution gives no protection to persons accused of committing local crimes in foreign countries.

Counsel for petitioner, in his brief and in argument, has cited several cases from which he argues that the doctrine that the Constitution does not "follow the flag" is outmoded, and is not now the law. *United States* v. *Flores,* 289 U. S. 137 (1933); *Blackmer* v. *United States,* 284 U. S. 421 (1932); *United States* v. *Bowman,* 260 U. S. 94 (1922); *Jones* v. *United States,* 137 U. S. 202 (1890); *Best* v. *United States,* 184 F. 2d 131 (1st Cir. 1950). On examination of those cases it is found that in every instance the crime involved was one denounced by some statute of the United States, and triable in some one of our District Courts. In no instance has it been even contended that a person accused of a purely local crime in a foreign country may claim any of the procedural

rights guaranteed in the Constitution of the United States.

It is plain, therefore, that the rule of *Toth* v. *Quarles* does not apply here. Still, as I have indicated, it is not enough to find that the provisions of our Bill of Rights and other prohibitory sections of our Constitution did not stand between Mrs. Smith and her trial by court-martial. If the jurisdiction is to be sustained, we must go farther, and discover in that instrument an affirmative grant of Congressional power, either expressly or by necessary implication.

It is in evidence that in the year 1952 the newly reorganized Government of Japan entered into a treaty with the United States, which was duly ratified by the Senate. By an administrative agreement implementing that treaty, the Japanese Government ceded to the United States, through its military courts and authorities, all jurisdiction to try offenses committed in Japan by dependents of members of the armed forces, excluding those of Japanese nationality. Had this treaty been in effect at the time Article 2 (11) of the Code of Military Justice was enacted, it might be cited as the source of Congressional power to pass this act; but it would scarcely be contended, I think, that a piece of legislation, if it were void for lack of constitutional authority when passed, could be validated by a later treaty, even though Congress might subsequently act freely in that field. However, the treaty did remove the limitations which in its absence would have prevented Article 2 (11) from taking effect, in that upon the ratification of the treaty there

was no longer any "accepted rule of international law" or any treaty to the contrary which interfered with its operation.

I am driven to the conclusion that constitutional authority for subjecting civilians accompanying the armed forces to court-martial discipline in time of peace, if such exists, must be found in Article 1, Section 8 of the Constitution, by one of the clauses of which section the power is bestowed on Congress "to make rules for the government and regulation of the land and naval forces," as supplemented by the "necessary and proper" clause.

Courts are slow to reject as unconstitutional a law which has been duly passed by Congress. Congressmen as well as Judges take an oath to support the Constitution of the United States. It is not probable that in any session of that body there should be a dearth of members who are themselves expert in the field of Constitutional law. It is not to be lightly supposed, therefore, that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power. True it is that if a law of Congress clearly transgresses some positive prohibition expressed in the Constitution it is the duty of a court to strike it down; but where, as here, the problem is merely to find authority for an act which is not forbidden by that instrument, we must proceed more cautiously. In view of the "necessary and proper" clause, we must weigh in the scales in favor of the law's validity every circumstance which may be rea-

sonably assumed to have influenced its enactment. As was said by Chief Justice Marshall in the celebrated case of *McCulloch* v. *Maryland*, 4 Wheat. 316 (U. S. 1819):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional * * * where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

Since the end of World War II segments of the Armed Forces of the United States have been stationed in many nations throughout the world. In the interest of keeping the morale of the troops on a high level, the Government has encouraged the wives of soldiers to accompany them and live with them at their various posts, and has expended vast sums of money in trans-

portation and maintenance charges for that purpose. It was said in argument and not disputed that there are now no fewer than a quarter of a million civilians of all descriptions accompanying the Armed Forces without the continental limits of the United States and the territories mentioned in Article 2 (11) of the Code of Military Justice. In the existing circumstances, if these civilians are to be exempt from discipline by the military forces in the only available way, namely, by court-martial procedure, a most serious situation is presented. They must then either be subject in all respects to the local laws of the countries where they are stationed, or else they are left free from all restraints whatsoever.

Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is "part" of the Armed Forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of those civilians accompanying the Armed Forces abroad is not necessarily and properly incident to the express power "to make rules for the government and regulation of the land and naval forces." Neither the *Toth* case nor any other expression by the Supreme Court compels such a conclusion. Therefore, I must uphold Article 2 (11) of the Code of Military Justice in its entirety.

The writ of habeas corpus will be discharged.

Entered: February 2, 1956.

In the United States District Court for the Southern District of West Virginia

Habeas Corpus No. 1726

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER, RELATOR

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., RESPONDENT

ORDER

For the reasons stated in the opinion of this Court filed on January 16, 1956, the writ of habeas corpus heretofore issued is discharged, and it is ordered that Mrs. Dorothy Krueger Smith be remanded to the custody of the respondent, Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia.

(S) BEN MOORE,
United States District Judge.

Dated: ----------

Approved as to form:

(S) Frederick Bernays Wiener,
FREDERICK BERNAYS WIENER,
Counsel for Realtor.

APPENDIX B

Security Treaty

TEXT OF TREATY

Japan has signed a Treaty of Peace with the Allied Powers. On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore, Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between Japan and the United States of America.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and, further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain certain of its armed forces in and about Japan, in the expectation, however, that Japan

will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

Article I

Japan grants, and the United States of America accepts the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside Power or Powers.

Article II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

Article III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

Article IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and of Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan area.

Article V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Washington

In Witness Whereof, the undersigned Plenipotentiaries have signed this Treaty.

Done in duplicate at the City of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

NOTES EXCHANGED BY SECRETARY ACHESON AND PRIME MINISTER YOSHIDA

September 8, 1951.

EXCELLENCY: Upon the coming into force of the Treaty of Peace signed today, Japan will assume

obligations expressed in Article 2 of the Charter of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter."

As we know, armed aggression has occurred in Korea, against which the United Nations and its members are taking action. There has been established a unified command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950, and the General Assembly, by Resolution of February 1, 1951, has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP, Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the members of the United Nations, the Armed Forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a member or members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the member or members, of the forces engaged in such United Nations action; the expenses involved in the use of Japanese facilities and

services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

Accept, Excellency, the assurance of my most distinguished consideration.

His Excellency
SHIGERU YOSHIDA,
Prime Minister of Japan.

[SEPTEMBER 8, 1951]

EXCELLENCY: I have the honor to acknowledge the receipt of Your Excellency's Note of today's date in which Your Excellency has informed me as follows:

Upon the coming into force of the Treaty of Peace signed today, Japan will assume the obligations expressed in Article 2 of the Charter of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter."

As we know, armed aggression has occurred in Korea, against which the United Nations and its Members are taking action. There has been established a Unified Command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950, and the General Assembly, by Resolution of February

1, 1951, has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP, Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the Members of the United Nations, the armed forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of the United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the Member or Members, of the forces engaged in such United Nations actions; the expenses involved in the use of Japanese facilities and services, over and above those provided to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

With full cognizance of the contents of Your Excellency's Note, I have the honor, on behalf of my Government, to confirm that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace

comes into force, Japan will permit and facilitate the support in and about Japan, by the Member or Members of the forces engaged in such United Nations action, the expenses involved in the use of Japanese facilities and services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations Member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Treaty between Japan and the United States would be at United States expense, as at present.

Accept, Excellency, the assurance of my most distinguished consideration.

The Honorable
DEAN ACHESON,
Secretary of State.

ADMINISTRATIVE AGREEMENT

PREAMBLE

Whereas the United States of America and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

Article I

In this Agreement the expression—

(a) "members of the United States Armed Forces" means the personnel on active duty belonging to the land, sea or air armed service of the United States of America when in the territory of Japan.

(b) "civilian component" means the civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan or who are mentioned in paragraph 1 of Article XIV. For the purpose of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals.

(c) "dependents" means

(1) Spouse, and children under 21;

(2) Parents; and children over 21, if dependent for over half their support upon a member of the United States armed forces or civilian component.

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas, not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

2. At the request of either party, the United States and Japan shall review such arrangements and may agree that such facilities and areas shall be returned to Japan or that additional facilities and areas may be provided.

3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return.

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for

limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

* * * * *

Article IX

1. The United States shall have the right to bring into Japan for purposes of this Agreemgnt persons who are members of the United States armed forces, the civilian component, and their dependents.

2. Members of the United States armed forces shall be exempt from Japanese passport and visa laws and regulations. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

3. Upon entry into or departure from Japan members of the United States armed forces shall be in possession of the following documents: (a) personal identity card showing name, date of birth, rank and number, service, and photograph; and (b) individual or collective travel order certifying to the status of the individual or group as a member or members of the United States armed forces and to the travel ordered. For purposes of their identification while in Japan, members of the United States armed forces shall be in possession of the foregoing personal identity card.

4. Members of the civilian component, their dependents, and the dependents of members of the United States armed forces shall be in possession of appropriate documentation issued by the United States authorities so that their status may be verified by Japanese authorities upon their entry into or departure from Japan, or while in Japan.

5. If the status of any person brought into Japan under paragraph 1 of this Article is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall, if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Japanese Government.

* * * * *

Article XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed

forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

(a) Japanese authorities may arrest members of the United States armed forces, the civilian component, or their dependents outside facilities and areas in use by United States armed forces for the commission or attempted commission of an offense, but in the event of such an arrest, the individual or individuals shall be immediately turned over to the United States armed forces. Any person fleeing from the jurisdiction of the United States armed forces and found in any place outside the facilities and areas may on request be arrested by the Japanese authorities and turned over to the United States authorities.

(b) The United States authorities shall have the exclusive right to arrest within facilities and areas in use by United States armed forces. Any person subject to the jurisdiction of Japan and found in any such facility or area, will, on request, be turned over to the Japanese authorities.

(c) The United States authorities may, under due process of law, arrest, in the vicinity of such a facility or area, any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall be immediately turned over to Japanese authorities.

(d) Subject to the provisions of paragraph 3 (c), the activities outside the facilities and areas of military police of the United States armed forces shall be limited to the extent necessary for maintaining order and discipline of and arresting members of the United States armed forces, the civilian component, and their dependents.

(e) The authorities of the United States and Japan shall cooperate in making available witnesses and evidence for criminal investigations and other criminal proceedings in their respective tribunals and shall assist each other in the making of investigations. In the event of a criminal contempt, perjury, or an obstruction of justice before a tribunal which does not have criminal jurisdiction over the individual committing the offense, he shall be tried by a tribunal which has jurisdiction over him as if he had committed the offense before it.

(f) The United States armed forces shall have the exclusive right of removing from Japan members of the United States armed forces, the civilian component, and their dependents. The United States will give sympathetic consideration to a request by the Government of Japan for the removal of any such person for good cause.

(g) Japanese authorities shall have no right of search or seizure, with respect to any persons or property, within facilities and areas in use by the United States armed forces, or with respect to property of the United States armed forces wherever situated.

At the request of the Japanese authorities, the United States authorities undertake, within the

limits of their authority, to make such search and seizure and inform the Japanese authorities as to the results thereof. In the event of a judgment concerning such property, except property owned or utilized by the United States Government, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment. Japanese authorities shall have no right of search or seizure outside facilities and areas in use by the United States armed forces, with respect to the persons or property of members of the United States armed forces, the civilian component, or their dependents, except as to such persons as may be arrested in accordance with paragraph 3 (a) of this Article, and except as to cases where such search is required for the purpose of arresting offenders under the jurisdiction of Japan.

(h) A death sentence shall not be carried out in Japan by the United States armed forces if the legislation of Japan does not provide for such punishment in a similar case.

4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities

or which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction.

5. In the event the option referred to in paragraph 1 is not exercised by Japan, the jurisdiction provided for in paragraph 2 and the following paragraphs shall continue in effect. In the event the said North Atlantic Treaty Agreement has not come into effect within one year from the effective date of this Agreement, the United States will, at the request of the Japanese Government, reconsider the subject of jurisdiction over offenses committed in Japan by members of the United States armed forces, the civilian component, and their dependents.

* * * * *

Article XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

2. Each party to this Agreement undertakes to seek from its legislature necessary budgetary and legislative action with respect to provisions of this Agreement which require such action for their execution.

Article XXVIII

Either party may at any time request the revision of any Article of this Agreement, in which case the two Governments shall enter into negotiation through appropriate channels.

Article XXIX

This Agreement, and agreed revisions thereof, shall remain in force while the Security Treaty remains in force unless earlier terminated by agreement between the parties.

EXCHANGE OF NOTES

UNITED STATES NOTE TO JAPAN

TOKYO, FEBRUARY 28, 1952.

EXCELLENCY:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby con-

firm that such is also the opinion of the United States Government.

In Article II, paragraph 1, of the Administrative Agreement, it is stipulated that, "agreements as to specific facilities and areas, not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement." The United States Government is confident that our two Governments are agreed that consultation shall be on an urgent basis in order to complete such arrangements at the earliest possible date. With this in mind, the United States Government is prepared to join with the Japanese Government in constituting a preliminary working group, consisting of a representative and the necessary staff from each Government to begin such consultations immediately, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

However, unavoidable delays may arise in the determination and preparation of facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. It would be much appreciated, therefore, if Japan would grant the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective

date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements.

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK,
Special Representative of the President,
of the United States of America.

JAPANESE NOTE TO THE UNITED STATES

TOKYO, FEBRUARY 28, 1952.

EXCELLENCY:

I have the honor to acknowledge the receipt of Your Excellency's Note of today's date in which Your Excellency has informed me as follows:

"I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

"In Article II, paragraph 1, of the Administrative Agreement it is stipulated that, 'agreements

as to specific facilities and areas, not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement.' The United States Government is confident that our two Governments are agreed that consultation shall be on an urgent basis in order to complete such arrangements at the earliest possible date. With this in mind, the United States Government is prepared to join with the Japanese Government in constituting a Preliminary Working Group, consisting of a representative and the necessary staff from each Government, to begin such consultations immediately, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

"However, unavoidable delays may arise in the determination and preparation of facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. It would be much appreciated, therefore, if Japan would grant the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements."

The Japanese Government fully shares the desire of the United States Government to initiate

consultations on an urgent basis in order to complete arrangements for the use of facilities and areas at the earliest possible date. The Japanese Government agrees, therefore, to the immediate constitution of the Preliminary Working Group referred to in Your Excellency's Note, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

With full appreciation of the contents of Your Excellency's Note, I have the honor, on behalf of the Japanese Government, to confirm that the Japanese Government will grant to the United States the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements.

Accept Excellency, the assurances of my highest consideration.

KATSUO OKAZAKI
(Minister of State).

U. S. GOVERNMENT PRINTING OFFICE: 1956

No. 713

In the Supreme Court of the United States

OCTOBER TERM, 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
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CITATIONS

Constitution, Statutes and Treaty—Continued

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OPINION BELOW

The opinion of the District Court (R. 12–19) is not yet reported.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus was entered on February 2, 1956 (R. 19–20). A notice of appeal by Walter Krueger, respondent here, to the Court of Appeals for the Fourth Circuit was filed on February 6, 1956 (R. 20), and the appeal was docketed in that court on February 21, 1956 (R.

21). The petition for a writ of certiorari before judgment was filed on February 27, 1956, and was granted on March 12, 1956 (R. 94). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Congress has power under the Constitution to confer jurisdiction on a court-martial to try a dependent wife of a member of the United States Army, residing in quarters provided by the Army in Tokyo, Japan, where her husband was stationed, for the crime of murdering her husband in Japan.[1]

STATUTE INVOLVED

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

> § 552 *Persons subject to this chapter* (Article 2)
>
> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accom-

[1] In his response to the petition for certiorari (pp. 2–5), respondent undertook to tender an additional, non-constitutional issue. Counsel for respondent has informed us that this effort has been abandoned.

panying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *.

STATEMENT

Mrs. Dorothy Krueger Smith was tried by a United States Army general court-martial convened in Tokyo, Japan, for the murder of her husband, a colonel in the United States Army, on or about October 4, 1952, at Tokyo, Japan. The court-martial, convened by Brigadier General Onslow S. Rolfe, Commander of Headquarters and Service Command, Far East Command, included as a member Major General Joseph P. Sullivan, Quartermaster of Army Forces Far East Command, who was appointed to the Court with the concurrence of his commanding officer, General Mark Clark, Commander in Chief, Far East Command, to sit thereon (R. 22). She was convicted and sentenced to life imprisonment (R. 23). Her conviction was affirmed by the Board of Review (*United States* v. *Smith*, 10 CMR 350) (R. 23–51). On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity and to the jurisdiction of the general court-martial to try a dependent wife, the conviction was affirmed (*United*

States v. *Smith*, 5 USCMA 314, 17 CMR 314 (R. 52–94).

In affirming the conviction, the Board of Review and the Court of Military Appeals held that Mrs. Smith was a person accompanying the armed forces without the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra* (R. 33–38). It was established at the trial that Mrs. Smith and her dependent children had entered Japan upon invitation of the United States Army, with the permission of the Japanese Government, solely as the dependent wife of a United States Army officer stationed there. Her transportation to Japan was accomplished by the Army. She and her husband were assigned quarters in "Washington Heights," a United States Army housing area in Tokyo. She was authorized to use, and did use, the facilities of the commissary, the post exchange and the dispensary which were maintained by the Army. The Board of Review also noted that at the time of the commission of the alleged offense there was in effect an Administrative Agreement under Article III of the Security Treaty Between the United States of America and Japan (Appendix A, *infra*, p. 10). Article XVII of the Administrative Agreement provided (*infra*, p. 20–21), with qualifications immaterial here, that "the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all

offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents * * *."

Following her conviction by the general court-martial in Japan, Mrs. Smith was confined in the Federal Reformatory for Women, Alderson, West Virginia (R. 6–7). On December 9, 1955, her father, General Walter Krueger, U. S. Army, Retired, respondent here, filed a petition for a writ of habeas corpus on her behalf in the United States District Court for the Southern District of West Virginia, directed to the warden of the prison where she is confined, praying for her release on the ground that the court-martial had lacked jurisdiction to try her (R. 1–4). On February 2, 1956, the court entered an order discharging the writ and remanding Mrs. Smith to the custody of the warden (R. 19). In its opinion, dated January 16, 1956, it ruled that the court-martial had jurisdiction to try Mrs. Smith under Article 2 (11) of the Uniform Code of Military Justice, and that the statute was within the competence of Congress to enact under Article I, Section 8, Clause 14 of the Constitution.

SUMMARY OF ARGUMENT

The constitutional issue here is substantially the same as that in *Reid* v. *Covert*, No. 701, this Term, with which this case is to be heard. For the reasons stated in appellant's brief in that

case (pp. 8–12, 27–65), the judgment of the District Court herein should be affirmed.

ARGUMENT

CONGRESS HAS POWER UNDER THE CONSTITUTION TO CONFER JURISDICTION ON A COURT-MARTIAL TO TRY A DEPENDENT WIFE OF A MEMBER OF THE UNITED STATES ARMY, RESIDING IN QUARTERS PROVIDED BY THE ARMY IN TOKYO, JAPAN, WHERE HER HUSBAND WAS STATIONED, FOR THE CRIME OF MURDERING HER HUSBAND IN JAPAN

With immaterial differences, the issue here is the same as that considered in Point II of the appellant's brief (pp. 8–12, 27–65) in *Reid* v. *Covert*, No. 701, this Term. Accordingly, we respectfully refer the Court to that discussion of the grounds which sustain Article 2 (11) of the Uniform Code of Military Justice.

The fact that the crime in this case occurred in October 1952 in Japan while Mrs. Covert killed her serviceman husband in England is not a salient difference, nor has respondent suggested that it is. With respect to the international aspects of the issue, the counterpart to the understanding incorporated in the Exchange of Notes in 1942 between the United States and the United Kingdom and the implementing legislation enacted in both countries,[2] (discussed in our *Covert* brief at pp. 48–65) is the Security Treaty entered

[2] The United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. 6, ch. 31 and the Service Courts of Friendly Foreign Forces Act, 1944 (58 Stat. 643, 22 U. S. C. 701–706).

into by the United States and Japan (Appendix A, *infra*, pp. 10–12). In fact, the similarity between the two cases points up the argument made in our *Covert* brief, pp. 48–65, that trial of a dependent accompanying the armed forces overseas must necessarily present a problem in international comity.

On September 8, 1951, the United States government signed the treaty of peace with Japan and the security treaty between the United States and Japan (Appendix A, *infra*, pp. 10–13). These treaties were ratified by the Senate on March 20, 1952, signed by the President on April 15, 1952,[3] and became effective on April 28, 1952. Article III of the Security Treaty (*infra*, p. 12) provided:

> The conditions which shall govern the disposition of armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments.

On February 28, 1952, the Department of State announced that the United States and Japan had signed at Tokyo on that date an Administrative Agreement in implementation of the Security Treaty between the United States and Japan (Appendix A, *infra*, pp. 16–24).[4] This Agree-

[3] 26 Dept. of State Bull. 687.

[4] *Id.*, p. 688.

[5] *Id.*, p. 382.

ment, arrived at by direct negotiations between the two governments, dealt with the use of facilities and areas, the sharing of costs, the jurisdiction over persons, certain privileges and exemptions, and the method of continuous mutual consultations, which were necessary and appropriate for the United States Armed Forces to carry out effectively their security mission under the Treaty. Insofar as it pertained to jurisdiction over persons, it provided in Article XVII (2) that

> * * * the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. * * *

Article I of the Agreement defines "dependent" to include "spouse."

There can be no doubt that Mrs. Smith comes squarely within the purview of the Administrative Agreement ceding to the United States the right to exercise court-martial jurisdiction over her for the crime of murdering her husband in Japan. She went to Japan as the dependent wife of Colonel Smith of the United States Army who was stationed there (R. 34). She lived in quarters in the military housing area, used the facilities of the commissary and post exchange,

and took advantage of the privileges afforded her at the dispensary (R. 24). She was a person accompanying the armed forces of the United States within the purview of Article 2 (11) of the Uniform Code of Military Justice, which empowered a court-martial to try her, and within the provisions of the agreement with Japan. As we have shown in the *Covert* case, Congress could constitutionally provide for the exercise of such extraterritorial jurisdiction by the system of tribunals existing under the Uniform Code of Military Justice.

In further support of this view, we print as Appendix B to this brief the opinion of the Court of Military Appeals in *United States* v. *Burney* (C. M. A. No. 5750, decided March 30, 1956), which reviews in detail the solid grounds of history, precedent, and national needs sustaining the validity of Article 2 (11).

CONCLUSION

It is respectfully submitted that the decision of the District Court should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
MARVIN E. FRANKEL,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

APRIL 1956.

APPENDIX A

Security Treaty

TEXT OF TREATY

Japan has signed a Treaty of Peace with the Allied Powers. On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore, Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between Japan and the United States of America.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and, further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain certain of its armed forces in and about Japan, in the expectation, however, that Japan

will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

Article I

Japan grants, and the United States of America accepts the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside Power or Powers.

Article II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

Article III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

Article IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and of Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan area.

Article V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Washington.

In Witness Whereof, the undersigned Plenipotentiaries have signed this Treaty.

Done in duplicate at the City of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

NOTES EXCHANGED BY SECRETARY ACHESON AND PRIME MINISTER YOSHIDA

September 8, 1951.

EXCELLENCY: Upon the coming into force of the Treaty of Peace signed today, Japan will assume obligations expressed in Article 2 of the Charter

of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter."

As we know, armed aggression has occurred in Korea, against which the United Nations and its members are taking action. There has been established a unified command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950, and the General Assembly, by Resolution of February 1, 1951, has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP, Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the members of the United Nations, the Armed Forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a member or members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the member or members, of the forces engaged in such United Nations action; the expenses involved in the use of Japanese facilities and services to be borne as at present or as otherwise

mutually agreed between Japan and the United Nations member concerned. In so far as the United States is concerned, the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

Accept, Excellency, the assurance of my most distinguished consideration.

His Excellency
SHIGERU YOSHIDA,
Prime Minister of Japan.

[SEPTEMBER 8, 1951]

EXCELLENCY: I have the honor to acknowledge the receipt of Your Excellency's Note of today's date in which Your Excellency has informed me as follows;

Upon the coming into force of the Treaty of Peace signed today, Japan will assume the obligations expressed in Article 2 of the Charter of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter."

As we know, armed aggression has occurred in Korea, against which the United Nations and its Members are taking action. There has been established a Unified Command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950, and the General Assembly, by Resolution of February

1, 1951, has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP, Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the Members of the United Nations, the armed forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of the United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the Member or Members, of the forces engaged in such United Nations actions; the expenses involved in the use of Japanese facilities and services, over and above those provided to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

With full cognizance of the contents of Your Excellency's Note, I have the honor, on behalf of my Government, to confirm that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate

the support in and about Japan, by the Member or Members of the forces engaged in such United Nations action, the expenses involved in the use of Japanese facilities and services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations Member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the security Treaty between Japan and the United States would be at United States expense, as at present.

Accept, Excellency, the assurance of my most distinguished consideration.

The Honorable
DEAN ACHESON,
Secretary of State.

ADMINISTRATIVE AGREEMENT

PREAMBLE

Whereas the United States of America and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

Article I

In this Agreement the expression—

(a) "members of the United States Armed Forces" means the personnel on active duty belonging to the land, sea or air armed service of the United States of America when in the territory of Japan.

(b) "civilian component" means the civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan or who are mentioned in paragraph 1 of Article XIV. For the purpose of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals.

(c) "dependents" means

(1) Spouse, and children under 21;

(2) Parents, and children over 21, if dependent for over half their support upon a member of the United States armed forces or civilian component.

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

2. At the request of either party, the United States and Japan shall review such arrangements and may agree that such facilities and areas shall be returned to Japan or that additional facilities and areas may be provided.

3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return.

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for

limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

* * * * *

Article IX

1. The United States shall have the right to bring into Japan for purposes of this Agreement persons who are members of the United States armed forces, the civilian component, and their dependents.

2. Members of the United States armed forces shall be exempt from Japanese passport and visa laws and regulations. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

3. Upon entry into or departure from Japan members of the United States armed forces shall be in possession of the following documents: (a) personal identity card showing name, date of birth, rank and number, service, and photograph; and (b) individual or collective travel order certifying to the status of the individual or group as a member or members of the United States armed forces and to the travel ordered. For purposes of their identification while in Japan, members of the United States armed forces shall be in possession of the foregoing personal identity card.

4. Members of the civilian component, their dependents, and the dependents of members of the United States armed forces shall be in possession of appropriate documentation issued by the United States authorities so that their status may be verified by Japanese authorities upon their entry into or departure from Japan, or while in Japan.

5. If the status of any person brought into Japan under paragraph 1 of this Article is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall, if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Japanese Government.

* * * * *

Article XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed

in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

(a) Japanese authorities may arrest members of the United States armed forces, the civilian component, or their dependents outside facilities and areas in use by United States armed forces for the commission or attempted commission of an offense, but in the event of such an arrest, the individual or individuals shall be immediately turned over to the United States armed forces. Any person fleeing from the jurisdiction of the United States armed forces and found in any place outside the facilities and areas may on request be arrested by the Japanese authorities and turned over to the United States authorities.

(b) The United States authorities shall have the exclusive right to arrest within facilities and areas in use by United States armed forces. Any person subject to the jurisdiction of Japan and found in any such facility or area, will, on request, be turned over to the Japanese authorities.

(c) The United States authorities may, under due process of law, arrest, in the vicinity of such a facility or area, any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall be immediately turned over to Japanese authorities.

(d) Subject to the provisions of paragraph 3 (c), the activities outside the facilities and areas of military police of the United States armed forces shall be limited to the extent necessary for maintaining order and discipline of and arresting members of the United States armed forces, the civilian component, and their dependents.

(e) The authorities of the United States and Japan shall cooperate in making available witnesses and evidence for criminal investigations and other criminal proceedings in their respective tribunals and shall assist each other in the making of investigations. In the event of a criminal contempt, perjury, or an obstruction of justice before a tribunal which does not have criminal jurisdiction over the individual committing the offense, he shall be tried by a tribunal which has jurisdiction over him as if he had committed the offense before it.

(f) The United States armed forces shall have the exclusive right of removing from Japan members of the United States armed forces, the civilian component, and their dependents. The United States will give sympathetic consideration to a request by the Government of Japan for the removal of any such person for good cause.

(g) Japanese authorities shall have no right of search or seizure, with respect to any persons or property, within facilities and areas in use by the United States armed forces, or with respect to property of the United States armed forces wherever situated.

At the request of the Japanese authorities, the United States authorites undertake, within the limits of their authority, to make such search and

seizure and inform the Japanese authorities as to the results thereof. In the event of a judgment concerning such property, except property owned or utilized by the United States Government, the United States will turn over such property to the Japanese authorities for disposition accordance with the judgment. Japanese authorities shall have no right of search or seizure outside facilities and areas in use by the United States armed forces, with respect to the persons or property of members of the United States armed forces, the civilian component, or their dependents, except as to such persons as may be arrested in accordance with paragraph 3 (a) of this Article, and except as to cases where such search is required for the purpose of arresting offenders under the jurisdiction of Japan.

(h) A death sentence shall not be carried out in Japan by the United States armed forces if the legislation of Japan does not provide for such punishment in a similar case.

4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place. The United States further undertakes to notify the

Japanese authorities of the disposition made by United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction.

5. In the event the option referred to in paragraph 1 is not exercised by Japan, the jurisdiction provided for in paragraph 2 and the following paragraphs shall continue in effect. In the event the said North Atlantic Treaty Agreement has not come into effect within one year from the effective date of this Agreement, the United States will, at the request of the Japanese government, reconsider the subject of jurisdiction over offenses committed in Japan by members of the United States armed forces, the civilian component, and their dependents.

* * * * *

Article XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

2. Each party to this Agreement undertakes to seek from its legislature necessary budgetary and legislative action with respect to provisions of this Agreement which require such action for their execution.

Article XXVIII

Either party may at any time request the revision of any Article of this Agreement, in which case the two Governments shall enter into negotiation through appropriate channels.

Article XXIX

This Agreement, and agreed revisions thereof, shall remain in force while the Security Treaty remains in force unless earlier terminated by agreement between the parties.

Exchange of Notes

United States Note to Japan

Tokyo, February 28, 1952.

Excellency:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

In Article II, paragraph 1, of the Administrative Agreement, it is stipulated that, "agreements as to specific facilities and areas, not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement." The United States Government is confident that our two Governments are agreed that consultation shall be on an urgent basis in order to complete such arrangements at the earliest possible date. With this in mind, the United States Government is prepared to join with the Japanese Government in constituting a preliminary working group, consisting of a representative and the necessary staff from each Government to begin such consultations immediately, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

However, unavoidable delays may arise in the determination and preparation of facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. It would be much appreciated, therefore, if Japan would grant the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements.

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK,
Special Representative of the President of the United States of America.

JAPANESE NOTE TO THE UNITED STATES

TOKYO, FEBRUARY 28, 1952.

EXCELLENCY:

I have the honor to acknowledge the receipt of Your Excellency's Note of today's date in which Your Excellency has informed me as follows:

"I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the Japanese Government, that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

"In Article II, paragraph 1, of the Administrative Agreement it is stipulated that, 'agreements as to specific facilities and areas, not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the

two Governments through the Joint Committee provided for in Article XXVI of this Agreement. The United States Government is confident that our two Governments are agreed that consultation shall be on an urgent basis in order to complete such arrangements at the earliest possible date. With this in mind, the United States Government is prepared to join with the Japanese Government in constituting a Preliminary Working Group, consisting of a representative and the necessary staff from each Government, to begin such consultations immediately, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

"However, unavoidable delays may arise in the determination and preparation of facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. It would be much appreciated, therefore, if Japan would grant the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements."

The Japanese Government fully shares the desire of the United States Government to initiate consultations on an urgent basis in order to complete arrangements for the use of facilities and areas at the earliest possible date. The Japanese

Government agrees, therefore, to the immediate constitution of the Preliminary Working Group referred to in Your Excellency's Note, with the understanding that the arrangements made by the Preliminary Working Group shall be put into effect as agreed and that the task of the Preliminary Working Group would be taken over by the Joint Committee upon the effective date of the Administrative Agreement.

With full appreciation of the contents of Your Excellency's Note, I have the honor, on behalf of the Japanese Government, to confirm that the Japanese Government will grant to the United States the continued use of those particular facilities and areas, with respect to which agreements and arrangements have not been completed by the expiration of ninety days after the effective date of the Treaty of Peace with Japan, pending the completion of such agreements and arrangements.

Accept Excellency, the assurances of my highest consideration.

KATSUO OKAZAKI
(Minister of State).

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

CHARLES F. BURNEY, CONTRACTOR TECHNICIAN, A PERSON ACCOMPANYING THE ARMED FORCES WITHOUT THE TERRITORIAL JURISDICTION OF THE UNITED STATES, APPELLANT

No. 7750

On Petition of the Accused-Below[1]

Decided March 30, 1956

Major Edmund B. Sigman argued the cause for Appellant, Accused. With him on the brief was *Lieutenant Colonel Stanley S. Butt.*

Major John M. Rankin argued the cause for Appellee, United States. With him on the brief was *Lieutenant Colonel Emanuel Lewis.*

OPINION OF THE COURT

GEORGE W. LATIMER, Judge:

The accused, a civilian employee of the Philco Corporation accompanying the Air Force outside the territorial jurisdiction of the United States,

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[1] 5 USCMA 680.

was convicted by a general court-martial of assault with a dangerous weapon in violation of Article 128, Uniform Code of Military Justice, 50 U. S. C. § 722. He was sentenced to pay a fine of $750.00, and to be confined at hard labor until the fine was paid, but for not more than twelve months. Intermediate appellate authorities have affirmed, and this Court granted the petition for review for the sole purpose of determining whether the court-martial possessed jurisdiction to try the accused. Only the facts necessary to a proper understanding of that issue will be related.

At all times pertinent to this decision, the accused was a civilian employee of the Philco Television and Radio Corporation. He was stationed at an Air Force Base in Japan, and his sole reason for being overseas was that he was employed in the maintenance of Air Force technical equipment in use at that location. He was supervised by Air Force personnel, worked side by side with Air Force members, was billeted and fed at the Air Base, and was accorded Post Exchange privileges. The manner in which he performed his work and conducted his personal activities had a direct bearing on the efficiency, discipline, and reputation of the Air Force in that area.

On the night of December 29, 1954, the accused, a fancier of firearms, was present in his quarters, together with Mr. John L. Clark and Mr. Clifton H. King, who were fellow-civilian technicians at Johnson Air Force Base, Japan. After a discussion of weapons in general, and the nuances of a deadly form of horseplay called

"Russian Roulette," the accused picked up one of his loaded revolvers, removed all of the cartridges except one, and, from a distance of five feet, pointed the weapon at Mr. Clark, despite that person's vigorous protests. Apparently acting on the premise that he knew the position of the loaded chamber in the gun, the accused pulled the trigger. As may be expected, he erred, and Mr. Clark was seriously wounded.

III

At about the time when this petition for review was filed, the Supreme Court handed down its decision in *Toth* v. *Quarles*, 350 U. S. 11, 76 S. Ct. 1, 100 L. ed — (1955), holding that an ex-serviceman, whose military status has been terminated by an honorable discharge and who is presently within the continental limits of the United States, is not amenable to court-martial jurisdiction for offenses committed prior to his discharge. As a predicate for that holding, the Supreme Court concluded that Article 3 (a) of the Uniform Code, 50 U. S. C. 553, which purported to confer jurisdiction to try former members of the military, was unconstitutional. The accused Burney then amended his petition so as to raise the question of jurisdiction, an issue which he had not earlier disputed. This, of course, he had a right to do, for that issue may be raised at any time, and is always before us. More than that, we must satisfy ourselves on that score, and the result ordered in the *Toth* case, supra, together with some of the language used in the opinion, requires us to give extended consideration to the question of court-martial jurisdiction over this accused.

We must accept in its full import, as we interpret it, the doctrine announced by the Supreme Court in that case. However, a holding by that Court that one severable section of the Uniform Code is unconstitutional does not demand that we invalidate another. Section 2 of the Code, 64 Stat. 145, embraces the usual savings clause, to the effect that each article, or part thereof, stands on its own foundation of legality, and is not affected by the invalidity of any other part of the enactment. Therefore, we are free to consider the question of jurisdiction in this instance, and are bound to, indeed entitled to, give effect only to the logic and reasoning expressed by the Supreme Court in Toth. In approaching our task, we must assume that the provisions of Article 2 (11) of the Code, 50 U. S. C. 552—which provide the basis for jurisdiction here and were not considered in Toth—are constitutional. Furthermore, all grants of jurisdiction to military courts found in the Code must be enforced by us unless we are convinced that they are fundamentally hostile to military due process, or that they have been specifically condemned by the Supreme Court. Neither of these conditions has been met here.

The statute under which the accused became subject to court-martial jurisdiction is Article 2 (11) of the Uniform Code of Military Justice, supra. To render easier the task of the reader in following the rationale which we will advance in support of our position, certain subsections of that Article dealing with civilians must be quoted. The parts of importance are as follows:

The following persons are subject to this code:

* * * * *

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

* * * * *

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States * * * [and the principal part of its territories].

Because the subsections quoted above were not under attack in the *Toth* case, it would take stronger and more pointed language than we find in that decision to lead us to conclude that the Supreme Court intended to invalidate all sections of the Uniform Code authorizing the trial of civilians by military courts. Certainly, unless the Supreme Court is to retreat from its previously announced views on military jurisdiction over personnel directly connected with the armed forces, there is no substance to the contention now advanced before us that courts-martial cannot constitutionally proceed with the trial of any person not a member of the military forces. We believe that, historically, both military and civilian law will show the untenability of that assertion.

Since the Supreme Court's decision in *Toth*, supra, three Federal district courts have been called upon to grapple with the question of the constitutionality of Article 2 (11) of the Code. In *Covert* v. *Reed*, decided November 22, 1955, Judge Tamm, of the District Court for the District of Columbia, concluded that, under *Toth*, Mrs. Covert, the wife of an Air Force sergeant who allegedly murdered her husband while they were stationed in England, was entitled to a civilian trial. However, in *Krueger* v. *Kinsella*, 137 F. Supp. 806, Judge Moore, of the District Court for the Southern District of West Virginia, reached the opposite conclusion. He held that Mrs. Smith, who was charged with killing her husband, a Colonel in the United States Army, while serving in Japan, was amenable to court-martial jurisdiction, and that Article 2 (11) of the Code, which purports to grant such jurisdiction, is constitutional. On February 16, 1956, in *Varney* v. *Commandant*, United States Disciplinary Barracks, Lompoc, California, Judge James M. Carter, of the District Court for the Southern District of California, Central Division, held Article 2 (11) of the Code to be a valid exercise of the Congressional power granted by the Constitution, to make rules for the government and regulation of the land and naval forces, as supplemented by the necessary and proper clause of the basic document. It is our conclusion that the two latter opinions, upholding jurisdiction, should be affirmed by the civilian appellate courts. Certainly the Article with which we deal can be supported by logic and the pages of history; it is not inconsistent with *Toth;* it

accords with principles announced by the Supreme Court in a number of prior cases; and it comes within the constitutional grant of jurisdiction to the military services, as it is an enactment which aids directly in governing and regulating the land and naval forces. In order best to substitute our position, we will first discuss those areas which have been left untouched by the *Toth* decision, and then move into the fields which may have been partially invaded.

III

It has never been doubted, since the Supreme Court's decision in *Dynes* v. *Hoover,* 20 How. 65, 15 L. ed. 838 (1858), that Congress had and has the constitutional power to render persons actually in the military service liable to trial by court-martial for the crimes they commit. Furthermore, the specific exception in the Fifth Amendment of "the trial of cases arising in the land or naval service from the ordinary provisions of law" (Attorney General Cushing, 43 Barbour 569 (N. Y.)) is one that is contemplated by Article I, Section 8, Clause 14, of the Constitution itself, which empowers Congress, "To make Rules for the Government and Regulation of the land and naval forces." In the words of Chief Justice Chase, speaking in Ex parte Milligan, 4 Wall 2, 137, 18 L. ed. 281 (1866):

> The Constitution itself provides for military government as well as for civil government.

* * * * *

> * * * there is no law for the government of the citizens, the Armies or the Navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution.

Not only does the power to make rules for the regulation of the land and naval forces authorize Congress to permit the military services to try their members without an indictment by a grand jury, it also empowers Congress to prescribe a trial for military personnel before triers of fact other than a jury of the State or District wherein the crime was committed. In *Ex parte Quirin*, 317 U. S. 1, 63, S. Ct. 2, 87 L. ed. 3 (1942), we find the following language:

> The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan*, supra, 4 Wall. 123, 138, 139, 18 L. Ed. 281. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

Thus, we consider the law well settled that whether they are within or without the territorial

limits of the United States and its possessions, members of the military establishment who are on active duty (Compare *Johnson* v. *Sayre*, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914 (1895), with respect to members of the militia who are not on active duty) can constitutionally be tried by a court-martial.

Moving on to the civilian groups which we believe to be constitutionally subject to trial by a court-martial, we consider first the provision contained in Article 2 (7) of the Code, supra. In *Kahn* v. *Anderson*, 255 U. S. 1, 41 S. Ct. 224, 65 L. ed. 469 (1921), cited in the *Toth* case, supra, the United States Supreme Court upheld the conviction by court-martial of certain prisoners who had been, or were about to be, dishonorably discharged from the Army. The trial took place in this country, in time of peace, under authority conferred by a predecessor statute to Article 2 (7), supra. It was argued that they were no longer members of the Army, but the Supreme Court held they were not entitled to be tried by a jury. This is what it said:

> * * * even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment.
>
> * * * * * *
>
> And as the authorities just referred to and the principles upon which they rest adequately demonstrate the unsubstantial character of the contention that to give

effect to the power thus long established and recognized would be repugnant to the Fifth Amendment, we deem it unnecessary to notice the question further.

In connection with this subject we observe that a further contention that, conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury, respectively secured by article I, § 8, of the Constitution, and article 5 of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained—a situation which was so obvious more than 40 years ago as to lead the court to say in *Ex parte Reed*, 100 U. S. 13, 21 (25 L. Ed. 538):

"The constitutionality of the acts of Congress touching Army and Navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const. art. I, § 8, and Amendment 5. In *Dynes* v. *Hoover*, 20 How. 65, the subject was fully considered and their validity affirmed."

Even though part of the language we quote may not have been necessary to that decision, we have no reason to believe that the Supreme Court will disavow the principles proclaimed in that opinion. Certainly it has shown no disposition to do so at the present time, for the Court has very recently declined to review a case involving jurisdiction under Article 2 (7), *supra*. *Lee* v.

Swope, 24 LW 3186, cert. denied February 27, 1956. If it does not later cast aside its own chosen words, persons who have been dishonorably separated from the service, but are still in the hands of the military for the purpose of serving a term of confinement, are subject to court-martial jurisdiction.

V

A second class of civilians is covered by Article 2 (10) of the Code which provides that, in time of war, all persons serving with or accompanying an armed force in the field are amenable to trial by military tribunals. The principle expounded in that provision is as old as history. We can, without difficulty, follow the history of civilian camp followers and sutlers as far back as the early part of the Sixteenth Century. During the reign of Maximilian I, of the Holy Roman Empire, 1493–1519, the province of Swabia formed mercenary armies which were rented out to, and fought for, the Holy Roman Empire. Every regiment of that Force was accompanied in the field by a number of followers, and though by the strict letter of the regulations only lawful wives were allowed to accompany soldiers, other women followed the colors. They performed the duties of washing, cooking, and the tasks of nursing the sick and wounded. Maintaining discipline over the force, including the civilians, was the responsibility of the military commander. 1 Fortescue, History of the British Army (1899), page 89.

Skipping over the years, we find civilians with the American and British Revolutionary Forces.

The British apparently had foreseen such a state of affairs, for the British Articles of War of 1765 provided as follows:

> SECTION XIV. ART. XXIII. All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders according to the Rules and Discipline of War."

A cursory sketch of the events of that time can be gathered from these recorded incidents. On June 30, 1775, General Artemas Ward, the first Commander-in-Chief of the American Armed Forces, issued an order relative to the punishment of women infesting the camp. He ordered that proper measures be taken by the military to bring civilians to punishment and many military orders authorizing the presence of women on the ration rosters were issued. General Washington, in the midst of his trials at Valley Forge, and while civilian processes were available, stated that women of the camp follower description should be either turned out of camp or arrested for trial and punishment. (Writings of Washington, Vol. X, page 421). Blumenthal, in his work, Women Camp Followers of the American Revolution, 1952, page 72, notes that Washington issued twenty-five orders on civilians and that the camp women were recognized as a necessary part of the armed forces. The Commissary to the British Army in America on May 17, 1777, rendered a daily victual report for the British troops which included 23,601 men, 2,776 women, and 1,904 children. (Wier-Robinson Corres Penna Historical Society, Dreer Coll MSS, pages

8 to 10.) The same manuscript contained similar reports relative to the composition of forces in Rhode Island and Philadelphia. Again, according to Blumenthal, the Hessian General Von Wurmb complained, "the fact is that this corps has more women and children than men, which causes considerable vexation," and it is interesting to note that the widows and orphans of slain soldiers remained subject to military control. On July 3, 1777, General Burgoyne ordered commanding officers to assemble sutlers and women of the regiments and inform them that persons found guilty of disobedience were to have their liquors and sutling stores destroyed and to be turned out of camp "besides receiving such corporal punishment as a court martial shall inflict." Burgoyne's Orderly Book, edited at Albany, 1860, page 24.

The foregoing extracts from the military past are sufficient to establish quite clearly that our founding fathers knew and expected that things would be as they always had been, i. e., that sutlers, retainers to the camp, and all persons serving with the armies in the field would be subject to military jurisdiction. That knowledge was recognized in all American military codes, both before and after the adoption of the Constitution.

The present Article has come down to us, with only minor changes, from the American Articles of 1775. Winthrop, on page 98 of his Military Law and Precedents, 2d ed., 1920 Reprint, furnishes us with a valuable history and comment. Before quoting from his work, we might add, parenthetically, that he suggests no reservation

as to the right of military courts in time of war to try persons in this category. These are his comments:

1. UNDER ART. 63. This Article, which is the most important and comprehensive of the statutes indicated, provides as follows:—"*All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.*" This provision, which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant. Owing indeed to the policy of our laws relating to the army, which has aimed to impress, in general, a distinctive military character—as officers and enlisted men—upon the persons employed in the military service proper, the classes of *attachés* mentioned in the Articl have been less varied and numerous in our armies than in those of foreign nations. In our

> late war, however, they were necessarily more considerable than at any previous period.

The "corresponding British article" referred to by Winthrop in the quotation set forth above has been identified in Davis, A Treatise on the Military Law of the United States, 2d ed., 1903, page 478, as an article in the "British Code of 1774." General Davis speaks of that Code as follows (page 340):

> The British Articles of War, although they remained substantially unchanged in matters essential to discipline, were frequently modified in respect to details; and new editions were issued from time to time, especially during the last half of the eighteenth century. * * * In evidence of this seven sets of Articles were issued between the years 1766 and 1775. Of these the Articles of 1774 were probably those from which our own Articles of 1775 and 1776 were obtained.

General Davis buttresses this conclusion with a comparative study of these articles, by way of footnote, and concludes (page 341):

> Our Articles of 1775 correspond more nearly with the British Articles of 1774 than with the Massachusetts Articles.
>
> John Adams, the chairman of the Committee of Congress charged with the preparation of the Articles of 1776, remarks in his autobiography [sic], under date of August 13, 1776, when the draft of the proposed Articles were submitted to Congress: "The British Articles of War were accordingly reported and discussed in Congress by me, assisted by some others, and

finally carried. They laid the foundation of a discipline which in time brought our troops to a capacity of contending with British veterans and a rivalry with the best troops of France." John Adams, Life and Autobiography, vol. iii. pp. 68, 69

In the light of the British Articles of War, the early American Articles of War, and the comments of those most intimately concerned with the drafting of our Constitution, we conclude the framers of that historic document were well aware of the then existing military law. In granting Congress the power to make laws for the land and naval service, they must have intended to permit Congress to enact into military law those provisions which made civilians accompanying or serving with military forces in the field subject to trial by courts-martial. Those patriots who were the architects of our Constitution knew all too well the consequences that might flow from lack of control over the camp follower and the sutler, and they could not have intended to deny the military the power to try them for their transgressions. Although the constitutionality of this statute and its many predecessors has often been challenged in Federal civilian courts, the attack has never been successful. *Ex parte Gerlach,* 247 Fed. 616 (S. D. N. Y.) (1917); *Ex parte Falls,* 251 Fed. 415 (D. N. J.) (1918); *Ex parte Jochen,* 257 Fed. 200 (S. D. Tex.) (1919); *McCune* v. *Kilpatrick,* 53 F. Supp. 80 (E. D. Va.) (1943); *Grewe* v. *France,* 75 F. Supp. 433 (E. D. Wis.) (1948).

As indicated by the Code, there are two essential ingredients which must be present before the

civilian in this category is subject to trial by courts-martial. The service must be in the field in time of war. The phrase "in time of war," must be construed to refer to the actualities of the situation, rather than the presence of a formal declaration to that effect by Congress, *United States* v. *Cancroft*, 3 USCMA 3, 11 CMR 3, and authorities cited therein, or the mere cessation of hostilities, *Kahn* v. *Anderson*, supra. The phrase "in the field" has been taken to imply military operations with a view to an enemy, 14 Op. Atty. Gen. 22 (1872), and the question of whether an armed force is "in the field" is determined by the activity in which it may be engaged at any particular time, not by the locality where it is found. *Hines* v. *Mikell*, 259 Fed. 28, 34 (C. A. 4th Cir.) (1919), cert denied 250 U. S. 645, 39 S. Ct. 494, 63 L. ed. 1187. In most instances, therefore, petitioners charged under this section, in seeking to escape the effect of their misconduct, have attempted to support their contentions that the court-martial lacked jurisdiction over them by asserting that, as a factual matter, they were not "accompanying" or "serving with" the armed forces. *Hines* v. *Mikell*, supra; *McCune* v. *Kilpatrick*, supra; *In re Di Bartolo*, 50 F. Supp. 929 (S. D. N. Y.) (1943); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio) (1944); *Perlstein* v. *United States*, 161 F. 2d 167 (CA 3d Cir.) (1945), cert. dism'd 328 U. S. 822, 66 S. Ct. 1358, 90 L. ed. 1602; *Grewe* v. *France*, supra; *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (1949). While we have been unable to find a square holding by the United States Supreme Court supporting military jurisdiction over this category of persons, many of the

lower Federal court holdings set forth above were cited, apparently with approval, in *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313, 66 S. Ct. 606, 90 L. ed. 688 (1946).

Finally, an accused may be regarded as "accompanying" or "serving with" an armed force, even though he is not directly employed by such a force or the Government, but, instead, works for a contractor engaged on a military project, or serves on a merchant ship carrying war supplies or troops. The test is whether he has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel. *McCune* v. *Kilpatrick*, supra; *Perlstein* v. *United States*, supra; *In re Di Bartolo*, supra; *In re Berue*, supra; *United States* v. *Robertson*, 5 USCMA 806, 814, 19 CMR 102.

In the present case, the accused worked directly for the benefit of the Air Force, he was supervised by Air Force personnel, he was quartered and messed on a military installation by military personnel, and he was accorded privileges normally granted only to military personnel. The operational success of that military command depended upon civilians such as this accused, and each of the services has found it necessary to rely on civilian technicians to repair and maintain the highly specialized signal and radar equipment now being used. The same type of services are performed, and substantially the same duties and obligations exist, between the individual and the service, regardless of whether he is an employee

of the Government, or whether he is paid by an intervening contractor. Therefore, we are sure that this accused stands on the same footing as would any civilian employed directly by an armed force in an overseas area.

Putting aside the authorities and military customs existing from time immemorial and discussed above, there is a sound core of logic underlying the principle that, in time of conflict, persons serving with or accompanying the armed forces, whether within or without the United States and its territories, must be subject to control by the services and to trial by court-martial. Those persons move with and often support combat troops. They may perform laborious tasks, technical maintenance work, administrative duties, or logistical functions, and failure on their part to perform their duty may be disastrous. In addition, they acquire much valuable information and they may be a fertile source of valuable intelligence data for the enemy. They receive benefits and protection from the military arm while performing their tasks, and their efforts are essential to the accomplishment of the military mission. The security of the nation may depend on their activities, and they should answer to their immediate protector for any transgressions. They need not volunteer for the service, but once they do, they willingly place themselves in an assignment where the success or failure of the mission of the particular armed force may be governed by their conduct, behavior, and strict compliance with orders. It is just as necessary that they be governed by the demands of the military situation as the very troops they serve.

Even a premature disclosure of their presence in an area may awaken an enemy to the presence of American combat troops. It is not too much, then, to demand obedience to military law from them, and to conclude that they must be subject to the provisions of the Code, albeit they are civilians who—when tried by a military court—are denied a trial by jury.

VI

We come then to the question of the constitutional validity of Article 2 (11), supra, which governs this case and which provides for court-martial jurisdiction over civilians who, in time of peace, serve with, work for, or accompany the armed forces outside the territorial limits of the United States and its possessions. This is the area we have referred to earlier as not fully explored; but as we unfold our development, we hope to show a well-established rule by the Supreme Court to the effect that Congress can confer on military courts jurisdiction over this class of citizens without offending against the Constitution.

It may well be that we give more credence to the following statement than was intended by the author, but Mr. Justice Black, speaking for the Supreme Court in *Duncan* v. *Kahanamoku*, supra, stated:

> * * * Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, *those directly connected with such forces*, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. [Emphasis supplied.]

If it were not for the problem of oversimplification, we might be content to say that our question is answered, because we are here dealing with the power of the military to exercise jurisdiction over a person who was, judged by appropriate standards, "directly connected" with the armed forces. However, we prefer to pass by the generalization and begin this part of our discussion with the premise set forth in *Toth*, supra, that this country should restrict military tribunals to the narrowest jurisdiction deemed essential to the maintenance of discipline among troops in active service. Regardless of how rigidly we construe that premise, we find much to support our conclusion that improper deportment on the part of civilians overseas, who are directly connected with the services, has an adverse impact on both discipline and its closely allied military intangible, morale, and ultimately on the success of the mission. We will later discuss in greater detail the issue of the demands and necessities of the service for authority to try civilians, but for the moment we pass further argument on that subject, and proceed directly to those precedents which we believe support a holding that Congress constitutionally may pass laws establishing military courts which are not manned and operated in the fashion of civil courts. We also conclude that it can render members of the civilian component who are overseas with an armed force amenable to its jurisdiction for trial of a criminal offense.

We consider it of some importance to mention that the provisions presently found in both Article 2 (10) and (11) of the Uniform Code

were taken, without material change, from Article of War 2 (d), 10 U. S. C., 1946 ed. sec. 1473, which provided for military jurisdiction over:

> All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles. * * *

Prior to 1916, only the jurisdiction now provided by Article 2 (10) of the Uniform Code was part of the Articles of War. In that year, however, the 64th Congress revised the Articles of War, 39 Stat. 650, and added the provision which became a part of 10 U. S. C. 1473 and is now Article 2 (11). The following extract from Senate Report No. 130, 64th Congress, 1st Session, page 30 et seq., sheds considerable light on the intent of Congress at that time:

> Subhead (d) of article 2, which corresponds to article 63 of the existing code, introduces the words "All persons accompanying," so as to make subject to the article a class of persons who do not fall under the designations, "retainers to the camp," and "persons serving with the armies in the field," employed in the existing law, and additional words are introduced so as to confer jurisdiction over all three classes of persons, to wit, (a) retainers, (b) persons accompanying, and (c) person serving with the armies of the United States in the field, in time of peace.

whenever the Army is serving outside the territorial jurisdiction of the United States. At present jurisdiction is limited to classes (a) and (c) and to a period of war. The purpose is to give full disciplinary authority over these three classes of persons when the army may be in peaceful transit through a foreign country, or where, as in Cuba in 1906, there is intervention in a foreign country falling short of war.

* * * * *

We now come to subhead (d) and here there is a change in the law which will claim your attention. In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.), and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United

> States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba. [Pages 30, 37, 38.]

Clearly, then, Congress intended to make just such a person as this accused subject to court-martial jurisdiction. This, we hold, was within its power unless the enactment contravenes the Fifth and Sixth Amendments to the Constitution, for it is clear, as was said in *Skiriotis* v. *Florida*, 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1193 (1941), that:

> * * * the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.

Article 5, Uniform Code of Military Justice, 50 U. S. C. 555, permits the military service to govern the conduct of those persons in the mili-

tary or those directly connected with it, in all places, foreign and domestic. This seems to us to make the Uniform Code more sweeping territorially than is the Constitution, for the reasons which we will later develop. But if, throughout the world arena, a trial by jury must be made available to one who accompanies the armed services, the Code cannot be used as a vehicle to punish offenders who exert a profound influence on their brothers in arms, and every accompanying civilian will either go free or be tried by the host country. It takes little judicial acumen to know that indictments and jury trials cannot be furnished in foreign fields and, for reasons which we will later advance, trial upon return to American soil is impracticable.

It has been accepted as sound doctrine, during the last seventy years at least, that the Constitution is territorial in its application, and not personal. That is to say, the Constitution was established to govern the United States of America, and thus did not apply, *of its own force and in the absence of an act of Congress,* to the territorial possessions of the United States. *Downes* v. *Bidwell,* 182 U. S. 244, 257, 21 S. Ct. 770, 45 L. ed. 1088, 1095 (1901). Similarly, apart from specific exceptions created by Congress, the jurisdiction of the Federal district courts is territorial: *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 65 S. Ct. 716, 89 L. ed. 1051 (1945). It follows that Congress need not deal with American citizens in foreign countries by enacting such a specific exception. In its discretion, Congress may, in the exercise of its powers, create legislative courts, such as consular courts,

grant them a wide range of criminal jurisdiction, and not run afoul of any constitutional prohibition. *Ex parte Bakelite Corp.*, 279 U. S. 438, 49 S. Ct. 411, 73 L. ed. 789 (1929).

While only obliquely germane to our problem, it has been held by the Supreme Court that Congress may assume complete sovereignty over a territory, such as the Hawaiian Islands, yet not grant unto its citizens those rights and privileges of the Constitution providing for indictment by grand and trial by petit juries. *Hawaii* v. *Mankichi*, 190 U. S. 197, 220, 23 S. Ct. 787, 49 L. ed. 1016, 1024 (1903); see also *Dorr* v. *United States*, 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128 (1904); and *Balzác* v. *Porto Rico*, 258 U. S. 298, 312, 42 S. Ct. 343, 66 L. ed. 627 (1922). This doctrine, which has inaccurately been described as the notion that the Constitution does not follow the flag, may be more precisely described as a group of decisions to this effect:

> * * * so long as Congress had not "incorporated" territory into the Union, neither military occupation nor cession by treaty make it domestic within the full operation of the constitutional guaranties, although there were doubtless some constitutional principles so fundamental as to go to the very root of the power of government. [Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford Law Review 587 (1949).]

The theory supporting the view that the Constitution is limited in its application to the United States and its incorporated territories is best expressed in the case of *Ross* v. *McIntyre*,

140 U. S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581, 586 (1891). In that case, the defendant, while serving upon an American vessel which was anchored in the harbor at Yokohama, Japan, murdered the vessel's second mate. He was tried, convicted, and sentenced to be hanged by the American consular tribunal in Japan. The President commuted the sentence to life imprisonment, and while incarcerated in Albany Penitentiary, New York, the petitioner sought habeas corpus. In the face of a contention by the defendant that Congress could not constitutionally provide for a criminal trial before an American consul, and deny to the accused the benefits of indictment by grand, and trial by petit, jury, the Supreme Court replied:

> * * * By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181 [34: 906, 912]. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither

> one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States; yet persons on board of such vessels, whether officers, sailors or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.

In the later case of *Downes* v. *Bidwell,* supra, the Supreme Court reaffirmed the decision in *Ross* v. *McIntyre,* supra, and phrased its holding in the following language (182 U. S. 244, 170):

> * * * [It is established] that the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury. * * *

If we substitute the words "military courts-martial" for the words "consular tribunals" in the above quotation, we have the exact situation which Congress attempted to bring about by enacting Article 2 (11) of the Uniform Code and its predecessor statutes. And how well the rationale of *Ross* v. *McIntyre,* supra, to the effect

that prosecutions will otherwise be abandoned, fits the military services operating overseas, may be illustrated without difficulty. The military services have been required to try civilians who were in foreign lands for a number of offenses of purely a local nature, such as murder, robbery, larceny, and extortion involving citizens of the host country. Our own judicial records and published opinions attest to that. Most assuredly, Congress could not enact a law which would guarantee a citizen who commits a crime of that type in a foreign country a grand jury presentment and a trial by Federal district court sitting either in the host or in this country. The rights of the host country cannot be disregarded, and while some reciprocal arrangement might be sought, it is extremely doubtful that the foreign sovereign would yield custody to this nation unless prosecution resulted before the offender left foreign shores.

Of course, in discussing the holding of the *Ross* case in *Downes* v. *Bidwell*, the Supreme Court was speaking of consular tribunals and not courts-martial. But because the present military code is more beneficient than the laws of war, and the mode of procedure followed before military commissions, in that it insures to every accused person every constitutional right except a presentment by a grand jury and trial by petit jury—and as to those a time-honored substitute has been afforded—we are sure that our substitution is constitutionally permissible. An examination of more recent Supreme Court opinions supports us in our conclusion that both tribunals have jurisdiction to proceed.

In *Madsen* v. *Kinsella*, 343 U. S. 341, 72 S. Ct. 699, 96 L. ed. 988 (1952), the petitioner was the dependent wife of an Air Force lieutenant stationed in Germany. In October 1949, she shot and killed her husband at their residence in Buchschlag, Kreis Frankfurt, Germany. In February 1950, she was tried by the United States Court of the Allied High Commission for Germany, Fourth Judicial District, found guilty of murder, and sentenced to a term of confinement. The court was composed of three judges, sitting without a jury. It should be remembered that the state of war and national emergency with respect to Germany was terminated July 25, 1947, by joint resolution of Congress, 61 Stat. 449. Leading up to a holding that the court which tried the defendant had concurrent jurisdiction over her, the Supreme Court said (343 U. S. 345):

> *Both United States courts-martial, and United States Military Commissions or tribunals in the nature of such commissions, had jurisdiction in Germany in 1949–1950 to try persons in the status of petitioner on the charge against her.*—Petitioner does not here attack the merits of her conviction nor does she claim that any nonmilitary court of the United States or Germany had jurisdiction to try her. It is agreed by the parties to this proceeding that a regularly convened United States general court-martial would have had jurisdiction to try her. The United States, however, contends, and petitioner denies, that the United States Court of the Allied High Commission for Germany, which tried her, also had jurisdiction to do so.

> In other words, the United States contends that its courts-martial's jurisdiction was concurrent with that of its occupation courts, whereas petitioner contends that it was exclusive of that of its occupation courts.

Later in its opinion, the Supreme Court discussed the enlargement of court-martial jurisdiction enacted by Congress in 1916 and, without questioning its constitutionality, said (343 U. S. 352, footnotes 18, 19):

> [18] The 1916 Act substituted, for Article 63 (see note 15, supra), a new Article 12 which provided that "*General courts-martial shall have power to try any person subject to military law* for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: * * *" [Emphasis supplied.] 39 Stat. 652, 41 Stat. 789, 62 Stat. 629, 10 U. S. C. (Supp. IV) § 1483. A new Article 2 then defined "*any person subject to military law*" so as to include—
>
> "(d) All retainers to the camp and *all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States*, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *" [Emphasis supplied.] 39 Stat. 651, 41 Stat. 787, 10 U. S. C. § 1473 (d).
>
> [19] In 1916, new Articles 92 and 93 expanded the jurisdiction of courts-martial

> over murder and certain other nonmilitary crimes so as to cover their commission by any "person subject to military law." *That phrase, through Article 2, included civilians in the status of petitioner.* [Emphasis partially supplied.]

Thereafter the Court spoke as follows (343 U. S. 355):

> * * * The enlarged jurisdiction of the courts-martial therefore did not exclude the concurrent jurisdiction of military commissions and of tribunals in the nature of such commissions.

In assessing the significance of *Madsen* v. *Kinsella*, supra, it is essential to bear in mind that court-martial jurisdiction cannot be conferred by consent of the accused. *United States* v. *Marker*, 1 USCMA 393, 3 CMR 127; *United States* v. *Garcia*, 5 USCMA 88, 17 CMR 88, and Federal authorities cited therein. Thus, even though the petitioner asserted that she was subject to trial by court-martial, a holding that there was no constitutional prohibition against such an exercise of jurisdiction was implicit in the Supreme Court's holding that the statute conferring courts-martial jurisdiction did not pre-empt the jurisdiction of the military commission. Otherwise, there would have been no necessity for considering either the question of pre-emption or of concurrent jurisdiction. But more important to this case is the express acknowledgment that the Government may try American citizens overseas by either courts-martial or military commissions, neither of which is manned by a jury. We cannot believe that all members of the Supreme

Court would fail to consider the question of whether the conviction was obtained in violation of the Fifth and Sixth Amendments to the Constitution. Certainly in *Re Yamashita*, 327 U. S. 1, 16, 66 S. Ct. 340, 348, 90 L. Ed. 499, constitutional rights were discussed, and there the Court was dealing with the rights of a non-citizen, after the fighting had ceased, even though a technical state of war still existed. Surely, if constitutional questions are considered for an alien, they would not pass unnoticed in a case such as Madsen, involving a citizen. If the constitutional privileges need not be extended in Germany when the American military leader, through the Executive, is in command in time of peace, it is difficult for us to find a good reason why they must be extended by Congress in Japan when our occupation is by virtue of a peace treaty with that foreign sovereignty. There was only one dissenter in *Madsen* v. *Kinsella*, and that was Mr. Justice Black, who seems to imply that Congress could have created some form of court to try Mrs. Madsen in Germany. Here is his reason for not joining with the majority:

> The very first Article of the Constitution begins by saying that "All legislative Powers herein granted shall be vested in a Congress" and no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens. Whatever may be the scope of the President's power as Commander in Chief of the fighting armed forces, I think that if American citizens in present-day Germany are to be tried by the American Government, they should be

civil under laws passed by Congress and in courts created by Congress under its constitutional authority.

Certainly, there is no intimation in that dissent that Congress would be constitutionally unable to do what Justice Black seems to advocate, and to us the authority granting to courts-martial the power to try overseas persons accompanying the Army in present-day Germany has part of its roots in the Constitutional provision granting to Congress the right to govern and regulate the land forces. Certainly, the grant of power to do that need not be so narrowly construed that offenders whose offenses have a direct bearing on the military services are untouchable.

It is impossible to escape the holding of *Madsen* v. *Kinsella*, supra, by contending that the court-martial's jurisdiction in that case was the jurisdiction of a military commission—powers which are presently given to general courts-martial by Article 18 of the Uniform Code. See *United States* v. *Schultz*, 1 USCMA 512, 4 CMR 104, as to Article of War 12, 10 U. S. C. 1483, the predecessor statute. We will not enter into an extended discussion of that contention for we believe the Supreme Court has held that the laws of war are respected and capable of application only "so far as they do not conflict with the commands of Congress or the Constitution." *Re Yamashita*, supra, 327 U. S. 1, at 16. Hence, in an ultimate sense, the authority of a military commission to proceed must spring from a constitutional source, just as must the jurisdiction of a court-martial. On habeas corpus, civil courts may inquire to determine whether "the

Constitution and laws of the United States constitutionally enacted forbid * * * [a] trial by military commission," just as in the case of trial by court-martial. *Ex parte Quirin*, supra, 317 U. S. 1, at 25. In addition, it is worthy of mention that in *Madsen* v. *Kinsella*, the Supreme Court spoke of military commissions as "constitutionally recognized agencies" (343 U. S. 341, 346), and of their judges as deriving their "constitutional authority" from the President as Commander-in-Chief of the armed forces (343 U. S. 341, 358). Thus, if there is any constitutional prohibition forbidding the trial of civilians by military tribunals in peacetime, outside the territorial limits of the United States, it would operate in the same manner against both military courts-martial and military commissions. Whatever privileges are conferred on a citizen in a foreign country, during peacetime, whether they spring from executive or legislative sources, ought to be measured by the same judicial standard.

The older case of *Neely* v. *Henkel*, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 (1901), is impossible to understand unless the hypothesis is accepted that Madsen, supra, is sound law. On December 10, 1898, the United States and Spain signed a treaty of peace, terminating the Spanish-American War, and this treaty was ratified and proclaimed April 11, 1899. This nation undertook to occupy Cuba, and on January 1, 1899, Major General John R. Brooke, U. S. Army, pursuant to a designation by the President, entered upon his duties as military governor of that island. Shortly thereafter, General Brooke

established military government courts, and on July 21, 1899, he promulgated laws governing postal affairs in Cuba. Between that date and May 4, 1900, the accused, a United States citizen serving as financial agent for the department of posts in Havana, Cuba, embezzled some $58,000 in postal funds. He then absconded and made his way to New York, where he was arrested and held for extradition, at the request of the military governor. Neely then sought habeas corpus, and having been denied the writ, carried the fight to the Supreme Court. The Supreme Court affirmed, and Mr. Justice Harlan, speaking for the Court, first noted (page 119) that the laws allegedly violated by Neely had been established by the military governor, and then held that Cuba constituted "foreign territory" for the purposes of the pertinent portions of the extradition statute, even though the United States was the sovereign in Cuba at the time. He then turned to the question of the constitutionality of the extradition statute, which provided for extradition from this country to any foreign country or territory occupied by or under the control of the United States, and said (pages 122–123):

> II. It is contended that the act of June 6th, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the Federal Constitution relating to the writ of habeas corpus,

bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guaranties of life, liberty, and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States, and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial"—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused.

> because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6th, 1900.

We have been able to find only one Circuit Court of Appeals case wherein the predecessor statute to Article 2 (11) of the Uniform Code was considered. In *United States* v. *Handy*, 176 F. 2d. 491 (C. A. 5th Cir.) (1949), the accused had been a civilian employee of the Army Post Exchange System in Frankfort-am-Main, Germany. On July 31, 1948, he was arrested and thereafter charged with a violation of the Articles of War. The sworn charges were served upon him shortly before December 9, 1948, and trial was scheduled to be held on that date. Pending trial, the accused had not been placed in confinement, but had merely been restricted to the limits of the city. He took advantage of this grant of comparative freedom of movement to escape and return to this country by air. He was arrested in Texas by military authorities, with a view to returning him to Germany to stand trial. In upholding the District Court's denial of his petition for habeas corpus, the Circuit Court assumed without question that jurisdiction under Article of War 2 (*d*) had attached while the accused was in Germany, and that even though the war

had officially ended, his subsequent flight to this country had not divested the military of its power to try the accused. The court necessarily must have concluded that the Constitution did not forbid the trial of the accused without a jury, despite his status as a civilian.

To avoid any suspicion that we are attempting to deny a person accompanying the armed service overseas all of the constitutional rights it is possible to give him, let us make ourselves clear. Once a person is held to be subject to military law, and he is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the Uniform Code of Military Justice, with the exception of a trial by jury and a presentment of a grand jury. Accordingly, for the purposes of this case, when we speak of the Constitution as not being applicable in every locale where Americans are found, we are expressing an opinion only as to those two Constitutional guaranties. What Congress may do in denying other rights is not before us—and probably never will be, as it is doubtful that military law will ever be changed so as to take from an accused those rights he presently enjoys. In that connection, it should be kept in mind that the present military code so resembles enlightened civilian criminal codes that the rights, privileges, and immunities granted in the military system are, so far as practicable, at least equal to those given in civilian law. If, therefore, military commissions, organized by a military governor, may try an American citizen under the strict procedural and narrow substantive rules and regulations which

have been prescribed in the orders creating them, it is most difficult for us to understand how the affording to a citizen overseas of a trial by court-martial denies any right to which he is entitled. On the contrary, Congress, by giving him an opportunity to be so tried, seems to us to have granted him a benefit, not to have denied him a privilege. Surely that was the theory upon which defense counsel proceeded in the *Madsen* case, supra.

With the limitation set forth in the preceding paragraph in hand, let us turn to the contention that certain other Supreme Court opinions, not mentioned herein at length until now, have had the effect of discrediting the rationale of such cases as *Hawaii* v. *Mankichi*, supra; *Downes* v. *Bidwell*, supra; and *Ross* v. *McIntyre*, supra. We do not believe this to be the case, for reasons we will now discuss.

In *United States* v. *Flores*, 289 U. S. 137, 53 S. Ct. 580, 77 L. ed. 1086 (1933), upon which appellant relies, the Supreme Court held that Section 2 of Article 3 of the Constitution grants to Congress the power to define and punish, in Federal district courts, crimes committed by Americans on American vessels in foreign waters. While, at first blush, this case would seem to say that the Constitution must be given extra-territorial effect, the very words used by the Court refute that proposition. After first observing that the criminal jurisdiction of the United States is in general based on the territorial principle, the court continued:

> * * * But that principle has never been thought to be applicable to a merchant

> vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty.

Furthermore, even if we were to grant that the *Flores* case, supra, holds that the Constitution may be given extraterritorial effect, the holding is of small comfort to the accused, for the case does not hold that Congress must give it that extraterritorial effect. And in the case of the Uniform Code, Congress did not choose to do so in certain areas.

Blackmer v. *United States*, 284 U. S. 421, 52 S. Ct. 252, 76, L. ed. 375 (1932), and *United States* v. *Bowman*, 260 U. S. 94, 43 S. Ct. 39, 67 L. ed. 149 (1922), are of no aid to the appellant here, for they hold that Congress may make United States citizens, resident in a foreign country, amenable to process issued by American courts, and punishable in the United States for offenses committed in foreign countries. But these cases do not hold that Congress is limited to providing trial by Federal district court for these citizens. Moreover, in those cases there was no alternate method of procedure available, for no American court, military or civilian, had jurisdiction or control over the individuals involved until they returned to the United States.

The case of *Best* v. *United States*, 184 F. 2d 131, 138 (C. A. 1st Cir.) (1950), would cause us more concern, saying, as it does, "that the protection of the Fourth Amendment extends to United States

citizens in foreign countries under occupation by our armed forces," if it were not for the fact that the Circuit Court put forth this proposition as no more than assumption; that this language does not more than set down a rule of evidence applicable in that Circuit; and that the language seems to be contrary to that employed in the Supreme Court opinion in *Madsen* v. *Kinsella*, supra.

Appellant replies that our development flies in the teeth of views firmly held by Colonel William Winthrop, the most widely esteemed author in military law, who said (Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, page 807): "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*" But at the time (1896) when this author wrote, this country had never sent or maintained an armed force abroad in time of peace, unless the punitive expedition sent to deal with the Barbary pirates can be so regarded, and then we are sure any civilians present would have been considered as in the field. Moreover, it is very unlikely that Winthrop ever contemplated the question of the constitutionality of an enactment such as Article 2 (11), supra, which has as its purpose the maintenance of law and order in overseas expeditionary forces composed of both military and civilian personnel. Had he done so, and persisted in his view, it would establish only that either he or this Court misunderstands the law in this field.

In the light of the quoted authorities, we encounter some difficulty in following the arguments of those who assert that the principles of

Toth v. *Quarles*, supra, go further than merely to hold that one who has severed all his relations with the armed forces and has been returned to this country is not subject to trial by court-martial. Aside from our belief that the Supreme Court did not intend to sweep aside a number of impressive precedents, we find much language in the opinion which supports a limited application of the principle enunciated.

First, the thrust of the majority opinion of the court strikes down Article 3 because it was an attempt to extend court-martial jurisdiction to persons not previously so amenable. Prior to the adoption of the Uniform Code, military law had been interpreted by the respective Judge Advocates General of the service—and their views were vindicated by the Supreme Court's holding in *Hirschberg* v. *Cooke*, 336 U. S. 210, 69 S. Ct. 530, 93 L. ed. 621 (1949)—to provide that a person honorably discharged from the service was not subject to prosecution in a military court for an offense committed prior to his separation. No such rule or principle prevailed in regard to camp retainers or persons accompanying the military forces outside the United States and its possessions at the time of the adoption of the Code. For Congress to name them as being within the scope of military law was not an extension of jurisdiction, but merely a reaffirmance of a pre-existing power.

Second, two eminent military authorities are relied on by the Supreme Court to support its holding of unconstitutionality, namely Colonel Winthrop and Major General Green, formerly The Judge Advocate General of the Army. The

latter appeared before the Congressional Committees to oppose certain provisions of the proposed Uniform Code of Military Justice. Conceding that General Green expressed the opinion that Article 3, if enacted, would be unconstitutional, he did not express any doubt about the legality of the predecessor provisions of Article 2 (10) and (11), and appears to have been of the opinion that the articles of War asserting jurisdiction over civilians accompanying or serving with military forces overseas were on firm ground. As to Colonel Winthrop, as we have earlier seen, it is doubtful that he considered the question of civilians overseas.

Third, we believe the Court recognized the principle that legislation on the subject of court-martial jurisdiction could be sustained if it was shown to be a reasonable and necessary exercise of the Congressional authority to make rules for the government and regulation of the land and naval forces. We find support for that principle in the following language from Toth:

> None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause. It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial

> when they are actually civilians. And we are not impressed by the fact that some other countries which do not have our Bill of Rights indulge in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts.

Of course, we, too, are not impressed with the laws of other countries which conflict with our heritage of legal institutions, but, more to the point, today we find our very preservation as a nation inexorably intertwined with the maintenance of large overseas contingents, composed of both military and civilian personnel. These groups are so closely related, in all aspects of the venture, that discipline and success will be affected adversely if one segment of the force is free to operate outside the law and the other is restricted to obedience. And this has always been true of armed forces being trained for or held in readiness for combat.

We have no doubt that the early sutlers, camp followers, and persons accompanying the armed forces in the field, by their conduct, behavior, manner of performing their work and their compliance or noncompliance with military orders, had a measurable impact on the discipline, morale, efficiency and success of the military force. Surely if that conclusion was not sound, early commanders would not have felt constrained to issue orders concerning their problems. In early times, it was found necessary to have all persons who were in the area of combat, contributing, directly or indirectly, to the success or downfall of the military mission, subject to the law of the

commander. Even with the authority to control the civilian followers, the early commanders were plagued with difficulties in protecting them and in channeling their efforts to carry on in such a manner that they would not interfere with military operation. As previously shown, the military commander could try those classes of persons if they offended against military law. In our overseas commands, present-day commanders are faced with the same problems. Conceding we are not in a state of declared war, our foreign armies may be likened to the Army garrisons in the far west during the days of the Indian Wars. They must be prepared to fight at the drop of a bomb, and their state of readiness depends upon control over those who contribute to the success of their operations. Camp followers in those days were considered a necessary part of a military expedition, and the military and political leaders of this country have concluded that civilian technicians form a vital segment of our overseas operations. Furthermore, few thoughtful people would deny the morale effect of permitting dependents to accompany their men to foreign assignments, and this country spends a tremendous sum of money to make that possible. Overseas commanders must protect the civilians who work for them, and the dependents who follow the serviceman, and if a commander cannot control, to some extent, their day-to-day behavior, the discipline, morale, repute and success of the Service will be injured. We can well imagine the impact on the Service if those who accompany our troops overseas, and live their daily lives with the serviceman, could ignore the rules and

regulations of the force commander. He is required to feed, house, care for, and protect them, and yet they could pay his orders no heed. In addition, civilian employees working with the Service and the dependents of service people are viewed by foreign countries as part of the military community. While they are civilians, the military is, in part, measured by their habits and behavior. If they are lawless and commit crimes against the public, discredit is brought on the service. Furthermore, all classes forming part of an overseas contingent, should be entitled to equal treatment by the law, and one class should not be preferred over the other. If such a condition is permitted to exist, at the expense of the serviceman, military discipline will be impaired. If a wife can murder her soldier husband and escape prosecution, why is the converse not true? Both have sinned, and each has affected the service involved. In this cold war era, as in the Revolutionary period, when the military community is commingled with civilian employees and dependents, the discipline of each affects the other. Under any situation in foreign countries, to free those civilians who are necessarily a part of the military operation from the legal and moral restraint placed on the military personnel, would create disciplinary problems of serious proportions. History shows it happened in the colonial days, with the civilians subject to military law, and if it comes to pass that they are now exempted, we can expect the difficulties to increase.

This is not the best case to use for illustration, but it offers an example of how a civilian em-

ployee might ruin both the morale of the individual airman and discipline in the Service. In an almost incredibly thoughtless manner, this accused pointed what he knew to be a loaded weapon at a fellow-human being, and despite his victim's appeal to reason, pulled the trigger. Had the accused shifted his aim just a trifle, he could easily have killed Clark, instead of wounding him. At all events, assault with a dangerous weapon is a serious offense which, in the military, carries a maximum sentence of three years. The victim was hospitalized at a military installation; the facts of such an incident as this would be common knowledge within the local military community; and the average airman would know that had such an act been done by a member of the armed services, he would immediately lose his liberty, and the issue of his guilt or innocence would be fairly and promptly resolved by a court-martial. If, then, he learns that his countryman who works beside him in a civilian capacity, and who is just as truly a part of the overseas task force, can commit a major offense and be free to roam, reasonably certain that the merits of the matter cannot be investigated by the only department of the Government available and equipped for that purpose, and know that prosecution, if ever, cannot be commenced until after almost interminable delays, the serviceman can only conclude that American justice is not equal for all. There is no rational basis for this discrimination, and a fixed belief in the minds of servicemen that the civilian component of an overseas force is free from restraint, while the serviceman is closely circumscribed, has an im-

mediate palpable, and adverse effect on discipline and morale.

Going from this case to areas far more damaging to the combat readiness of an overseas command, it is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statement. If the Services have no power within their own system to punish that type of offender, then indeed overseas crime between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit. At best, the detection and prosecution of crime is a difficult and time-consuming business, and we have grave doubts that, in faraway lands, the foreign governments will help the cause of a military commander by investigating the seller or user of habit-forming drugs, or assist him in deterring American civilians from stealing from their compatriots, or their Government, or from misusing its property.

Let us suppose, for the purpose of argument, that offenses by civilians in foreign lands would not simply be ignored, and that some sort of prosecution would be attempted. Having in mind that we are considering only overseas personnel, should we, of all judges, force any American citizens, civilian or military, into a foreign court? Consideration must be given to this matter, for if these civilians cannot be tried by American military courts under American standards, then the host country will, in many instances, take over the prosecution. Some discussion of that unpalatable alternative is in order.

On July 15, 1953, the United States Senate ratified the Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, 99 Cong. Rec. 8837–38 (July 15, 1953), TIAS 2846. Article VII of this Agreement, commonly known as the NATO Status of Forces Agreement, provides in part as follows (99 Cong. Rec. 8724, et seq., July 14, 1953):

> 1. Subject to the provisions of this Article,
>
> (*a*) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (*b*) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State,

Other pertinent provisions are to the effect that the military authorities of the sending State have the primary right to exercise jurisdiction over a member of its forces or its civilian component whenever the offense is solely against its property or security, or solely against the person or property of another member of that force or a civilian component or dependent, or where the offense arises out of any act or omission done in the performance of official duty. Article VIII, Section 3 (*c*), supra. It follows, therefore, that if United States civilians who accompany, serve with, or are employed by, the armed forces overseas are not subject to military law, they are subject only to the jurisdiction of the foreign State. At the very least, that nation is free to prosecute if the military jurisdiction is not to be exercised. Under those circumstances, it answers no useful end to speak of making punishable in United States Federal courts local offenses committed overseas by United States civilians. The receiving State simply need not, and undoubtedly will not, permit them to go beyond its territorial limits. Thus the worst fears of the opponents of the Treaty will be realized, 99 Cong. Rec. 4659 (May 7, 1953), 99 id. at 8735 (July 14, 1953), and the basic premise of its proponents undermined. 99 Cong. Rec. 8762-8769 (July 14, 1953). As will be seen, much the same situation is presented by our relations with Japan.

On February 28, 1952, the United States and Japan entered into the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and

Japan, TIAS 2492, February 28, 1952. Article XVII of that Agreement provides in pertinent part:

> * * * the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.
>
> * * * * *
>
> The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such

waiver, Japan may exercise its own jurisdiction.

Once again, it is clear that the parties intended the United States to have the primary right to exercise jurisdiction over United States civilians present with our armed forces in Japan. Similarly, trial by military tribunal was contemplated. Surely then, if the military authorities have no constitutional right to exercise this jurisdiction, trial will be had, for any major crime, in a Japanese court. True enough, the record does not establish that assault with a dangerous weapon is recognized as an offense by Japanese law. But we have no doubt that at least something similar could be found within its penal code. Moreover, expanding the rule beyond this case, most of the offenses committed would find their way into Japanese courts as they no doubt would be of such a character as to offend against that nation's law. Trial in a foreign court, then, is the true alternative to court-martial jurisdiction.

The previous argument is no mere makeweight. It was the intent of founders of our Constitution to insure basic guarantees of due process to each citizen. Treaties are the law of the land as well as statutes, and surely Congress and the Executive have not done anything inconsistent with that intent by providing trial by military tribunal for civilians overseas, for Constitutional safeguards are far more likely to be extended to United States citizens in a trial by court-martial than in a trial in a foreign court. The courts of foreign sovereigns, especially in civil law countries, are bound to follow traditions which are

foreign to American standards of due process of law. Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb.

We think we may safely assert that American citizens would prefer trial by an American court-martial to a proceeding in a foreign tribunal, if their wishes were to be given any consideration in the matter. Certainly that statement is true if any lesson can be drawn from the desires voiced by American servicemen overseas. In the Congressional Record, February 20, 1956, page A1552, we find the following:

> Congressman FRANK J. BECKER, New York, visited American servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who have been tried and convicted in foreign courts and are now serving sentences in foreign prisons.
>
> Those imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial.

> They felt that they would have had a much fairer trial and would have preferred to have an American officer defend them, even if they would have received more severe penalties from United States authorities. This was the rule before the Status of Forces Treaty.
>
> In France, a man is guilty until proven innocent; under our Constitution a man is presumed innocent and must be proven guilty. All but one GI would have preferred the court martial to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English.

In disposing of this issue, we cannot fail to comment on one obstacle which renders impracticable the trial of Americans after their return to American soil, for offenses against foreign local law. If criminal law cannot be enforced expeditiously, it loses its deterrent effect. If it cannot be enforced at all, it fails entirely. Although American citizens domiciled or resident abroad are subject to subpoena by American civil courts, *Blackmer* v. *United States*, supra, no one supposes that foreign witnesses residing in their native land are amenable to the process of United States courts. They cannot be compelled to appear and testify, and depositions, when they can be used, are of little, if any, value. Rule 15, Federal Rules of Criminal Procedure, 18 U. S. C. An accused is usually at a disadvantage and the Government benefited if the prosecution of the crime can be held at a great distance from the point of commission. The founding fathers must have believed in that concept, for in their efforts

to protect an accused, they required that he should be tried by an impartial jury of the State and district wherein the crime was committed. If, as some people suggest, Congress could provide or has provided for prosecution at accused's point of return to this country, 18 U. S. C. 3238, we feel secure in our belief that, in many instances, he would be without friends, witnesses, or counsel who could effectively assist him in collecting evidence. In other instances, the Government, in all probability, would be handicapped by the unavailability of witnesses. Of course, Congress could make offenses committed overseas by civilians punishable in Federal district courts, but such an enactment would have little practical utility. Must the Service transport the accused and all the witnesses back to the United States? Or, must the prosecution await the return of the military forces to this country? In this case, the accused could be returned to the United States by his employer or by the Government. Next, the victim and the other civilian eyewitness could probably be compelled, by subpoena, to give up their employment. Their way to the United States and return could be paid for them. And they could be compelled to testify against the accused. The Air Force could be required to relieve the five other witnesses from their assignments, transport them to the United States, and maintain them in readiness to testify. But surely such a system would entail tremendous expense, fantastic waste, cumbersome procedures, and interminable delay. More than that, such a scheme of operation would never be used, so long as the receiving nation stands ready to prosecute.

The reader is referred to the facts of the case of *United States* v. *Smith*, 5 USCMA 314, 17 CMR 314; see *Krueger* v. *Kinsella*, supra. An indispensable witness to that prosecution for premeditated murder was a Japanese maid. Could her deposition be used by the Government? Not according to law. Rule 15, Federal Rules of Criminal Procedure, supra. Assuming that Japan would consent to a removal of the accused from its jurisdiction, is it seriously contended that the maid would be subject to the compulsory process of a local district court? Congress apparently gave consideration to many of the obstacles suggested above, and concluded it would be impracticable to require trial in the United States, for it provided another method of procedure which permits trial on foreign shores. We are sure it did not exceed its powers in so doing and that the Government is entitled to its verdict in this case.

When the problem is considered in all of its aspects, a holding in favor of jurisdiction is demanded by constitutional construction, Congressional amendment, and Supreme Court precedent. Accordingly, the decision of the board of review is affirmed.

QUINN, Chief Judge (concurring in the result):

At the outset, it is important to repeat what I said at the beginning of my dissenting opinion in *United States* v. *Sutton*, 3 USCMA 220, 228, 11 CMR 220: "I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication by the provisions of the

Constitution itself." Consequently, in my opinion, there is no merit to the argument that the Constitution has no application outside the continental limits of the United States. The cases cited in support of that argument deal with the general question of the territorial application of the Constitution, *Hawaii* v. *Mankichi*, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016; *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088, or with the practical inapplicability of specific provisions of the Constitution to "residents or temporary sojourners abroad." *Ross* v. *McIntyre*, 140 U. S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581. Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law. And the military law governs our armed forces whether they are within or without the continental limits of the United States.

As for nonmilitary persons, the United States generally follows the territorial principle of crime; that is, an act is normally punishable only if it has consequences within the physical limits of the United States or its possessions. There are exceptions, of course, as in the case of counterfeiting. 18 U. S. C. 471. However, the United States also has the right, and the duty, to regulate the conduct of its citizens, and other persons for whom it vouches, when they are in foreign countries. *Skiriotes* v. *Florida*, 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1193; *Blackmer*,

v. *United States,* 284 U. S. 421, 52 S. Ct. 252, 76 L. ed. 375; *Ross* v. *McIntyre,* supra. In providing standards of conduct for nonmilitary persons outside the United States, Congress exercises its sovereign authority to govern their "conduct * * * in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes* v. *Florida,* supra, page 73. The NATO Status of Forces agreement and the Administrative Agreement between the United States and Japan are concrete examples of our Government's recognition of its responsibility in this field. What, then, are the standards of conduct, and the enforcement procedures, that Congress can adopt for nonmilitary persons for whom this Government is responsible during the time they are in foreign countries? Certainly, it cannot adopt standards and procedures which are repugnant to the fundamental principles of American justice which "go to the very root of the power of government." Fairman, Some New Problems of the Constitution Following the Flag. 1 Stanford L. Rev. 587 (1949). This limitation on the Congressional power is implied in the opinion of the United States Court of Appeals for the First Circuit in *Best* v. *United States,* 184 F. 2d 131 (1950). On the other hand, Congress is not limited to standards of conduct and enforcement procedures which the Constitution requires for persons within the country, but which, outside the country, are either impossible of accomplishment, or are so impracticable as to "in a majority of cases, cause an abandonment of all prosecution." *Ross* v. *McIntyre,* supra, page 464.

Common sense and sound practice indicate that prescribed standards of conduct should be the same for the military as for those persons who, although not actually members of the military, are "part of the armed forces," *Toth* v. *Quarles*, 350 U. S. 11, 15, 76 S. Ct. 1, 100 L. ed. ——, or are "directly connected with such forces," *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313, 66 S. Ct. 606, 90 L. ed. 688. These same considerations also indicate that enforcement procedures should be the same for both groups. And that is exactly what Congress accomplished by Article 2 (11) of the Uniform Code of Military Justice, 50 U. S. C. 552.

Congress assured the nonmilitary personnel abroad of all the guarantees and rights of the United States Constitution except those of indictment by grand jury and trial by a petit jury. The Constitution recognizes these exceptions as to military personnel, see my dissenting opinion in *United States* v. *Sutton*, supra, page 228. Necessity justifies the exceptions as to nonmilitary persons beyond the continental limits of the United States. Thus, in *Ross* v. *McIntyre*, supra, the United States Supreme Court pointed out the substantial impracticability of attempting to provide for indictment by a grand jury and trial by a petit jury of persons accused of crime in foreign countries. As to such persons Congress can constitutionally provide a different method for the initiation and prosecution of charges. Of course, Congress can establish a separate civilian court for the trial of nonmilitary persons abroad. However, constitutionally it is not required to do so. Again since such individuals are "directly

connected" with the armed forces abroad, good sense and sound practice indicate that they should be tried by court-martial. Under the circumstances, enlargement of courts-martial jurisdiction is not "at the expense of the normal and constitutionally preferable system of trial by jury." *Toth* v. *Quarles,* supra, pages 22–23. On the contrary, it provides a practicable, effective, and economical method of affording a constitutionally fair and just trial to nonmilitary persons who constitute "part of the armed forces" abroad. In my opinion, therefore, Article 2 (11) of the Uniform Code of Military Justice is constitutional, and the court-martial had the power to try and to punish the accused.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

UNITED STATES EX REL. WALTER KRUEGER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR THE RESPONDENT IN THE NATURE OF A CROSS-PETITION FOR A WRIT OF CERTIORARI.

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Respondent joins the Solicitor General in praying that a writ of certiorari issue to review the above-entitled case.

The public importance of the constitutional question presented by the petition is obvious, and, since decision of that question depends on the scope of the doctrine of *Toth* v. *Quarles*, 350 U. S. 11, it is not likely that consideration thereof by Courts of Appeals in the several circuits, with, it may be, conflicting

rulings pending ultimate review here, is likely to result in clarification.

Nor are the parties in interest apt to reconsider their positions. Notwithstanding two decisions in the United States District Court for the District of Columbia invalidating military trials of civilians in time of peace (*United States ex rel. Covert* v. *Reid*, pending on appeal, No. 701 this Term (dependent wife); *Hurlahe* v. *Wilson*, Habeas Corpus No. 94-55, D. D. C., decided January 4, 1956 (civilian employee)), all three services have announced to the public that they will continue to try civilian dependents and employees by court-martial pending final decision by this Court as to the legality of such trials.[1] Such a threat of continued unconstitutional action plainly calls for an early determination of the basic question by this Court, and accordingly, as has been indicated, respondent joins in the prayer that a writ of certiorari be granted.

If respondent had prevailed in the district court, then, on familiar principles, he would be able to rely on any issue in the case to sustain the judgment below without specifically assigning it as error. "A respondent can support his judgment on any ground that appears in the record." *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 134, note 3, and cases there cited. But respondent here is a respondent only formally; he is in fact assailing the judgment here, a circumstance that would appear to bring into play the countervailing principle that "A respondent * * * may not attack [a judgment] even on grounds asserted

[1] See Washington *Evening Star*, Nov. 30, 1955; *Washington Daily News*, Dec. 6, 1955; *The Navy Times*, December 10, 1955.

in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him." *Letulle* v. *Scofield*, 308 U. S. 415, 421-422.

No decision here, so far as respondent is aware, has ever considered the right of a nominal respondent, unsuccessful in the district court, to raise here, without the filing of a cross-petition, questions additional to those presented by the party who prevailed in the district court where such prevailing party's petition was granted prior to judgment in the court of appeals. In *United States* v. *United Mine Workers*, 330 U. S. 258, and again in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, cross-petitions were in fact filed by the respondents and granted by this Court.

Accordingly, out of an abundance of caution, respondent files this memorandum in the nature of a cross-petition, so that, if the petition is granted, he may argue the following non-constitutional question that was duly raised in the district court (petition for habeas corpus, par. 13) and there decided against him (Pet. 11-13), viz.:

> Is a court-martial lawfully constituted when, being appointed by a Brigadier General, it includes a Major General as a member thereof?

This question has substance. According to Winthrop (1 *Military Law and Precedents* (2d ed. 1896) *54-55 [1920 reprint, pp. 49-50]), a court-martial is "a purely executive agency designed for military uses" that is "called into existence by a military order"; such order being (*id.* at *229 [reprint, p. 158]) "a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person

or persons specifically or in general terms indicated * * *." Granted that, over the years, a court-martial has come to be regarded as more and more of a court, it is still "called into existence by a military order." See *Manual for Courts-Martial, U. S., 1951*, ¶36*b*: "A court-martial is created by an appointing order issued by the convening authority."

That being so, a Brigadier General cannot issue an order to a Major General, whose rank is one grade higher by statute (R. S. § 1466, 34 U. S. C. § 241), nor can the Major General be directed by the common superior of both to take orders from a subordinate who is acting, as a convening authority must, in his own name; to do so would violate the hierarchy of rank prescribed by the statute. (There are qualifications which are not relevant in the present case, and so need not be considered at this juncture.) The basic rule must be viewed against two other propositions, first, that the appointment of a court-martial is still an attribute of command which devolves with command (*United States* v. *Bunting*, 4 USCMA 84, 15 CMR 84; *United States* v. *Williams*, 6 USCMA 243, 19 CMR 369); and, second, that the improper composition of a court-martial is a point that is never waived and so may be asserted collaterally at any time. *McClaughry* v. *Deming*, 186 U. S. 49, 66-70.[2] It fol-

[2] *Swaim* v. *United States*, 165 U. S. 553, relied on by the District judge (Pet. 13), is wide of the mark, as the statute there was directory only, and contained a discretionary clause, viz., "when it can be avoided". The same was true in other military law cases that turned on similar directory statutes. *Hiatt* v. *Brown*, 339 U. S. 103 ("available for the purpose"); *Kahn* v. *Anderson*, 255 U. S. 1 ("without manifest injury to the service"); *Mullan* v. *United States*, 140 U. S. 240 (same). Here, however the appointing authority was given no discretion whatever to issue an order to an officer senior to himself.

lows that, in the present case, the court-martial was convened by an order illegal on its face, with the result that its proceedings were, and here must be held to have been, absolutely void.

None the less, the constitutional issue still looms large, as a reversal on the sole ground that the court-martial was improperly constituted would still leave the petitioner free to assert, as the appellant in *Covert v. Reid*, No. 701 this Term, is presently urging, that such reversal does not deprive the respective armed force of power to retry a dependent wife by court-martial, even in the United States.

Accordingly, respondent prays that the writ of certiorari be granted in this case in respect both of the question presented by the Solicitor General and of the question presented here.

Respectfully submitted.

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FEBRUARY 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the district court (R. 12-19) is reported at 137 F. Supp. 806.

JURISDICTION

The judgment of the district court discharging the writ of habeas corpus and remanding Mrs. Smith to petitioner's custody (R. 19-20) was entered on February 2,

1956. Respondent's notice of appeal (R. 20) was filed on February 6, 1956, and the cause was docketed in the court of appeals on February 21, 1956 (R. 21). The petition for writ of certiorari before judgment was filed on February 27, 1956, and was granted on March 12, 1956 (R. 94). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1). See also Supreme Court Rule 20.

QUESTION PRESENTED

Whether a civilian woman, the dependent wife of an officer in the Army, may constitutionally be tried by court-martial in time of peace and not in occupied territory.[1]

CONSTITUTIONAL PROVISIONS, EXECUTIVE AGREEMENTS, AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in the Appendix to Appellee's Brief in *Reid* v. *Covert*, No. 701, and will not be repeated here.

The Administrative Agreement with Japan, TIAS 2492, 3 U. S. Treaties 3342, is set forth in pertinent part at pp. 16-25 of the Petitioner's Brief in this case.

STATEMENT

This was a habeas corpus proceeding, brought by the respondent, a retired General of the United States Army, to secure the release of his daughter, Mrs. Dorothy Krueger Smith, who was held in a federal penal institution pursuant to a sentence of life imprisonment imposed on her by an Army court-martial for the killing of her husband.

Mrs. Smith, who now and all her life has been a civilian, was the wife of Colonel Aubrey D. Smith, U. S. Army, and

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[1] A non-constitutional issue was also presented by the respondent in his Memorandum in the Nature of a Cross-Petition, at pp. 2-5. That issue has been abandoned for reasons set forth in Point I below, pp. 8-11.

in October 1952 was living with him and their two minor children in Tokyo, Japan, in quarters furnished by the United States Government, Colonel Smith being assigned to Headquarters Far East Command (R. 1, 7, 23-24). While there she enjoyed the usual amenities furnished by the Army to the dependents of its military personnel (R. 1, 7).

The record discloses that Mrs. Smith had been under psychiatric treatment over a long period, beginning late in 1947 (R. 30-31), and continuing through the spring of 1952 at an Army hospital in Tokyo (R. 29). At that time she was told that the next hospitalization would result in her evacuation for medical reasons (R. 29).

In August and September, 1952, barbiturates and paraldehyde were prescribed for her (R. 30), and early in October, on the day of the homicide, she had been taking paraldehyde (R. 24, 27, 31). On the night of October 3, 1952, she stabbbed her husband with a knife, inflicting wounds from which he died the following day (R. 25-27).

Mrs. Smith was charged with premeditated murder, in violation of Art. 118(1), UCMJ,[2] and was tried by an Army general court-martial in Japan on January 5-10, 1953 (R. 2, 7).[3] She was convicted of the charge, and was sentenced to imprisonment for life (R. 2, 7, 23).

The principal issue at the trial concerned Mrs. Smith's sanity. The members of the sanity board concluded (R. 28-29) that she was able to distinguish right from wrong and to adhere to the right, Brig. Gen. Chambers, Medical Corps, Chief of the Division of Psychiatry and Neurology

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[2] The system of abbreviations used in this brief is identical with that explained in the "Glossary of Military Law Abbreviations" which faces p. 1 of Appellee's Brief in *Reid* v. *Covert*, No. 701.

[3] The complete record of trial was introduced as Respondent's Exhibits 1 and 2 below, see R. 21, and is now lodged with the Clerk of this Court.

in the Surgeon General's Office, considered her unable to adhere to the right, although within the terms of the Army's Technical Manual 8-240, *Psychiatry in Military Law*,[4] her episodes were merely character and behavior disorders (R. 31-32).

An Army Board of Review, acting under Art. 66, UCMJ, affirmed Mrs. Smith's conviction, holding that her condition was not such as to impair her legal responsibility, and denying appellate defense counsel's request for a new psychiatric evaluation (R. 39-43); the Board's opinion (R. 23-47) is reported at 10 CMR 350.[5]

Meanwhile, pursuant to Art. 73, UCMJ, Mrs. Smith had petitioned for a new trial on the basis of newly discovered evidence, viz., the statement of a member of the sanity board to the effect that when he signed the board report (R. 45) "he believed that the conclusions set forth therein met the requirements contained in TM 8-240, *Psychiatry in Military Law;* that if the same questions had been propounded to him in civilian practice, where he was not subject to the limitations imposed by the cited technical manual, he would not have fully concurred in the conclusions reached by the board because, 'from a purely medical point of view,' he was of opinion that the accused was suffering from a mental defect, disease or derangement at the time of the alleged offense, that she was incapable of 'setting out to kill her husband in a calculated, premeditated way,' and that her ability to adhere to the right was impaired."

The Board denied the petition on the ground of failure to exercise due diligence (R. 46).

Thereafter, see R. 47-48, Mrs. Smith's case came before a differently constituted Board of Review (cf. R. 23 with

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[4] Identical with Air Force Manual 160-42, which was in issue in No. 701.

[5] The last few sentences of the opinion are missing from R. 47; they will be found in 10 CMR at 371.

R. 47) for reconsideration, on the basis of further psychiatric examinations conducted at Letterman Army Hospital, as follows:

Three medical officers concluded (R. 48) that, when she stabbed her husband, Mrs. Smith's condition "is estimated to have been such as to markedly impair and diminish her ability to adhere to the right," and that "the accused was not capable of having the degree of intent and willfulness which would constitute premeditation."

Two civilian expert consultants to The Surgeon General of the Army, however, concluded (R. 48) that the accused, at the time of the commission of the offense, was unable to distinguish right from wrong or to adhere to the right. These consultants attributed their differences of opinion with their military colleagues to the effect of Technical Manual 8-240 on the views held by the latter group (R. 49).

The Board of Review reaffirmed the findings and sentence in their entirety (R. 47-51), in an opinion reported at 13 CMR 307.

The Court of Military Appeals, one judge dissenting, likewise affirmed Mrs. Smith's conviction, in opinions (R. 52-94) that are reported at 5 USCMA 314 and 17 CMR 314.

That tribunal rejected (R. 54-70) the rule of *Durham* v. *United States*, 214 F. 2d 862 (D. C. Cir.), deeming itself bound by the tests for insanity set forth in MCM, 1951, ¶120*b*. The Court appeared (R. 68) to have been influenced by the circumstance that, if Mrs. Smith had been adjudged insane by a military acquittal, she could not have been committed to any institution by the military authorities, and (R. 68) that "In truth, the only prospect for her 'treatment' would seem to lie either in voluntary commitment or in a decision by some state to accept her as its ward."

Chief Judge Quinn dissented (R. 91-94), essentially on the ground that (R. 93-94) "the medical experts considered

themselves bound by the manual's terms, to the exclusion of their individual professional beliefs."

The decision of the Court of Military Appeals was handed down on December 30, 1954; the present petition for habeas corpus was filed nearly a year later, on December 9, 1955 (R. 1-4).

Insofar as now material,[6] that petition set forth Mrs. Smith's trial by court-martial, the proceedings on military appellate review, and asked for her release on the ground of the unconstitutionality of Art. 2(11), UCMJ, pursuant to which she was tried: That provision was alleged to violate Article III, Section 2, and the Sixth Amendment, both of which guarantee a jury trial, and to be outside the scope of Article I, Section 8, Clause 14, which, it was said (R. 3), "does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace."

The writ issued (R. 4-5) and petitioner made return (R. 6-9), alleging (R. 7) that Mrs. Smith was a person accompanying the armed forces within the meaning of Arts. 2(10) and 2(11), UCMJ, and that all of the material events occurred in a 'time of war' as that term is used in the Uniform Code. Relator's traverse (R. 10-11) restated the allegations of his petition.

The district court in a written opinion (R. 12-19) upheld the constitutionality of Art. 2(11), saying (R. 19), "Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is 'part' of the armed forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of these civilians accompanying the armed forces

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[6] Allegations relating to the composition of the court-martial, which are not now pressed, see pp. 8-11, *infra*, are accordingly omitted.

abroad is not necessarily and properly incident to the express power 'to make rules for the government and regulation of the land and naval forces.'" He accordingly discharged the writ and remanded Mrs. Smith to petitioner's custody (R. 19-20).

Respondent filed a prompt notice of appeal (R. 20), which was duly perfected (R. 21). Petitioner then sought and was granted (R. 94) a writ of certiorari prior to judgment in the court of appeals.

SUMMARY OF ARGUMENT

I. Contentions based on the composition of the court-martial that tried Mrs. Smith are formally abandoned, because success thereon will not assure Mrs. Smith's liberty. Were her conviction to be set aside, the military authorities would, as in No. 701, be contending that jurisdiction still exists to retry her in this country. If that question, as now seems quite possible, is not reached in No. 701, then the basic constitutional question will have to be relitigated, perhaps in a forum that will require her once more to exhaust the tedious military appellate process before that question can be determined.

II. Article 2(11), UMCJ, is unconstitutional for the reasons set forth in Appellee's Brief in No. 701. Mrs. Smith's situation is identical with that of Mrs. Covert, since, at the time of her trial by court-martial, American forces were in Japan, not by right of conquest, but with Japan's consent. *Madsen* v. *Kinsella*, 343 U. S. 341, is therefore inapplicable.

III. Petitioner is correct in abandoning the contentions urged by her in the district court under Art. 2(10), UCMJ. On the basis both of the earlier precedents and of the legislative history of the Uniform Code, Tokyo during the hostilities in Korea was not "in the field." The Army recognized that when it sent dependents to Japan and permitted them to remain there, while refusing to send dependents to Korea.

IV. The invocation of the treaty power cannot sustain court-martial jurisdiction in this case either.

Apart from the circumstance that the pleadings in this case (as well as the legislative history of Art. 2(11), and the practice thereunder) show that reference to the treaty power is an afterthought, the terms of the Administrative Agreement with Japan show that all that was intended was a representation that the United States would exercise its military jurisdiction vigorously and in good faith.

To the extent that the Administrative Agreement with Japan is interpreted as conferring on American courts-martial a jurisdiction which they did not have under the power to govern the armed forces, it abridges Mrs. Smith's right to trial by jury, and therefore cannot be given effect, for the obvious reason that the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

V. To the extent that invocation of the Necessary and Proper Clause brings the matter into the realm of judgment, this case also demonstrates both the lack of necessity and the utter impropriety of subjecting a dependent wife to the treatment that is in fact meted out to her in the course of the court-martial process.

ARGUMENT

I. RESPONDENT FORMALLY ABANDONS ALL CONTENTIONS BASED ON THE COMPOSITION OF THE COURT-MARTIAL THAT TRIED MRS. SMITH

In his petition for habeas corpus (R. 3, ¶13), respondent contended that, assuming the constitutionality of Art. 2(11), UCMJ, the general court-martial that tried Mrs. Smith had no jurisdiction because it was improperly constituted. The same contention was reasserted and briefly argued at pp. 2-5 of respondent's Memorandum in the Nature of a Cross-Petition in this Court.

After searching reappraisal, we are now formally abandoning this point, essentially because, even if respondent were ultimately to prevail thereon, there is no assurance that such success would assure his daughter's liberty.

1. Assuming success on the traditional jurisdictional point, viz., that on habeas corpus "it must appear affirmatively and unequivocally that the court [martial] was legally constituted" (*Runkle* v. *United States*, 122 U. S. 543, 556), Mrs. Smith would be within the continental limits of the United States with her military conviction set aside but with the military charges against her still pending. She would then be in the precise position of Mrs. Covert in No. 701, for, plainly, the continuation of military jurisdiction *vel non* would not be in any different posture whether the conviction were set aside because of error in the composition of the court disclosed on collateral review (this case), or because of error in the conduct of the trial on direct review (No. 701). And, since the Air Force's position that military jurisdiction continued in No. 701 has been espoused, and is now being pressed, by the Solicitor General, it is not to be supposed that the Army in the present case would put forward a less comprehensive view of its powers.

2. Whether, in those circumstances, military jurisdiction attaching under Art. 2(11), UCMJ, would be destroyed, is a question that, considering the jurisdictional infirmity inherent in No. 701 (see the order postponing jurisdiction in that case, 350 U. S. 985, and the briefs therein), may not be reached by this Court in that case.

3. Thus, assuming success on the question of the composition of the court-martial in the present case, respondent would still be obliged to litigate, wherever a custodian of his daughter could be reached with process, the question of the constitutionality of Art. 2(11), UCMJ.

That question has evoked different answers in the lower courts. Two judges in the District of Columbia have held

Art. 2(11) unconstitutional. *Reid* v. *Covert*, No. 701; *Hallahe* v. *Wilson*, Habeas Corpus No. 94-55, D. D. C., McGarraghy, J., decided January 4, 1956. In the Southern District of West Virginia (this case) and in the Southern District of California (*In re Varney*, Civil No. 19257-C, J. M. Carter, J., February 16, 1956), the same provision has been held constitutional. Therefore respondent would be faced with substantial relitigation before his daughter could be freed.

4. Moreover, in the *Varney* case, Judge J. M. Carter held that a civilian tried by court-martial was not entitled to have a petition for writ of habeas corpus even entertained until he had first exhausted all of the appellate remedies prescribed by the Uniform Code of Military Justice. Conclusion of Law II(a). Whatever may be the position of one clearly subject to military law with respect to the exhaustion of all military remedies (cf. *Gusik* v. *Schilder*, 340 U.S. 128), it would seem on principle that a civilian contending for non-amenability to military law has an absolute right to obtain an adjudication of his status the moment that he is detained by the military. But as long as the *Varney* ruling stands (cf. *United States* v. *Chamberlin*, 184 F. 2d 404 (C.A. 7), affirmed by equally divided court, 342 U. S. 845), there is always the possibility that it will be followed elsewhere.

It took Mrs. Smith from January 1953, when her trial commenced (R. 22), until end of December 1954, when the Court of Military Appeals decided the case (R. 52), to exhaust her military remedies. The corresponding period in Mrs. Covert's case (No. 701, R. 12, 97) was somewhat more than two years.

Thus, success on the non-constitutional issue might still require Mrs. Smith to be retried by court-martial, and thereafter force her father to embark on an expensive, time consuming, soul-searing course of litigation before there could be reached the basic constitutional issue which

permeates this case, and in respect of which the Government sought and obtained review by certiorari.

That constitutional issue is not feigned. The parties to this case are not seeking premature decision of a question that may never be reached. The Army has officially determined that, "pending decision by a higher appellate tribunal, the provisions of Article 2(11) will continue to be applied where appropriate," notwithstanding the ruling in the *Covert* case.[7] Respondent is abandoning his non-constitutional point only because his counsel are convinced that he cannot be certain of obtaining an adjudication of his daughter's rights thereunder. To that extent, his private interest joins with the public interest asserted by the petitioner in asking that there be determined the basic and inevitable constitutional issue implicit in this case: May the armed forces in time of peace try dependent wives by court martial?

II. ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PURPORTS TO AUTHORIZE THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE

Respondent incorporates by reference the contentions that were set forth under the above heading in Point III, pp. 36-91, of Appellee's Brief in No. 701, *Reid* v. *Covert*.

Only a very few words will serve to establish the identity between Mrs. Smith's case and that of Mrs. Covert.

At the time of Colonel Smith's death, American forces were no longer in Japan as military occupants by right of conquest. The Multilateral Treaty of Peace with Japan (TIAS 2490; 3 U. S. Treaties 3169) had become effective on April 28, 1952, and after that date, the United States forces in Japan were there with the consent of Japan, as expressed in the Security Treaty between the two governments (TIAS 2491; 3 U. S. Treaties 3329; Pet. Br. 10-12).

[7] Department of the Army Message 367634, November 25, 1955.

Consequently the status of Mrs. Smith in Japan was precisely the same as that of Mrs. Covert in England, and neither case therefore presents any exercise of the war power or any instance of the military government powers of a court-martial under Art. 18, UCMJ. It follows that *Madsen* v. *Kinsella*, 343 U. S. 341, which was cited by the Court of Military Appeals to sustain military jurisdiction here (R. 52), is completely inapposite. See Point III E, pp. 69-76, of the *Covert* brief.[8]

Petitioner lays some stress (Pet. Br. 8-9) on the circumstances that Mrs. Smith "lived in quarters in the military housing area, used the facilities of the commissary and the post exchange, and took advantage of the privileges afforded her at the dispensary." But these amenities are equally available, at least to the extent that facilities are at hand, for the dependents of every officer of the Army stationed in the United States. Had the Smiths been quartered at Fort Myer, Mrs. Smith would have enjoyed precisely the same emoluments that she is shown to have had in Tokyo. See Department of the Army Pamphlet No. 21-5, *Personal Affairs of Military Personnel and Aid for their Dependents*, 14 April 1954.

There are in this case no other factors under Art. 2(11) that require special mention.

III. PETITIONER IS CORRECT IN ABANDONING THE CONTENTIONS URGED BY HER IN THE DISTRCT COURT UNDER ARTICLE 2(10), UNIFORM CODE OF MILITARY JUSTICE

In her return (R. 7), petitioner asserted that Mrs. Smith was a person accompanying the armed forces within the meaning of Art. 2(10), UCMJ, which subjects to the Code "In time of war, all persons serving with or accompanying an armed force in the field," and also that all events material to Mrs. Smith's case "occurred in a 'time of war' as

[8] If Mrs. Smith had been tried by court-martial during the pendency of the occupation, counsel would assuredly not have commenced the present proceeding.

that term is used in the Uniform Code of Military Justice." Respondent made due denial in par. 1 of his traverse (R. 10).

No question under Art. 2(10) was set up in the Petition for Certiorari herein, and no contentions under Art. 2(10) are made in petitioner's brief on the merits, by incorporation or otherwise. Even a summary review of the authorities suffices to establish the soundness of petitioner's concession in that regard.

1. At the time Mrs. Smith was tried in Japan, as has been seen, American troops were there with Japanese consent and not by virtue of the right of conquest. No general court-martial, therefore, had any vestige of military government power. And the circumstance that Korean hostilities were still in progress did not alter the situation.

The analogy here is that of our own Indian Wars. Those conflicts were similarly undeclared; those conflicts similarly involved fighting and casualties; and so the Indian Wars were real wars. 13 Op. Atty. Gen. 31; 13 Op. Atty. Gen. 470; 13 Op. Atty. Gen. 472. Yet it was uniformly held that the war-time camp-follower jurisdiction could be exercised only in the immediate vicinity of the actual Indian campaigns. See Dig. Op. JAG, 1912, p. 151:

> "LXIII B. The jurisdiction authorized by this article [AW 63 of 1874] can not be extended to civilians employed in connection with the Army *in time of peace* [italics in original, citing 16 Op. Atty. Gen. 13 and 48], nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war. [Ruling from 1877.] In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war. [Rulings from 1877, 1903, and 1909.]"[9]

[9] The earlier rulings are also in the 1901 Digest, p. 57, ¶165; *id.*, 1895, p. 76, ¶5; *id.*, 1880, p. 19, ¶5.

Winthrop (*136-137; reprint, p. 101) was to the same effect: "In general indeed, the jurisdiction created by the Article [AW 63 of 1874] should be extended with special caution over civilians serving with troops during an *Indian* war, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is ordinarily but brief as compared with other wars."

And "in the field" was interpreted by Attorney General Devens—who had been a general officer during the Civil War—to "imply military operations with a view to an enemy. * * * When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army 'in the field'." 14 Op. Atty. Gen. 22, 23.

Applying the reasoning of the classical exponents of American military law to this case, therefore, it follows that hostilities in Korea—such as they were in January 1953, the date of trial—did not create war-time camp-follower jurisdiction in Tokyo.

2. Under the impact of the emotions engendered in World War I, the older test was abandoned. In April 1918, The Judge Advocate General held that, since an army in the field must be supplied from bases previously established, the Bush Terminal in Brooklyn, New York, was "a part of the line of communication which supply our troops in France," and that accordingly a civilian quartermaster employee there who committed a theft of military stores was subject to trial by court-martial. 2 Op. JAG (1918) 243-245.[19]

On this reasoning the entire country was within the theater of operations and hence "in the field." This wide jurisdiction was in fact exercised, see World War I cases in 4 Bull. JAG. 223-229, and, in two of the three cases that

[19] One of a series of three volumes, from 1917 to 1919, publishing opinions of The Judge Advocate General in full and not merely in digest form.

came before the courts, it was sustained. *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.) (quartermaster employee on Mexican border); *Hines* v. *Mikell*, 259 Fed. 28 (C. A. 4), certiorari denied, 250 U. S. 654 (auditor in constructing quartermaster's office in South Carolina cantonment); *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (employee of civilian contractor in Massachusetts cantonment; jurisdiction not sustained). After the war, it was accordingly said that "in the field" included not only the theater of actual hostilities, but also the lines of communication and the reserves and service of supplies under actual military control. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 116.

3. World War II brought, if not a return to the traditional view, at least a sharply restricted exercise of military jurisdiction over civilians at military installations in the United States, see World War II cases noted in 4 Bull. JAG 223-229, and in nearly four years of war only two cases involving trials of civilians serving with the Army for offenses committed in the United States reached the courts. Jurisdiction was sustained where the individual was a cook embarked on a transport about to sail from Hampton Roads to the war zone (*McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E. D. Va.)), and denied where the individual was a civilian engineer employee in the Canal Zone (*Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D. C. Z.)).

The case of *In re Berue*, 54 F. Supp. 252 (S. D. Ohio), which in fact involved an offense committed on the high seas on board a ship carrying supplies for the Army, contained at p. 255 a discussion of "in the field" which the drafters of the Uniform Code adopted. Here is what both Committees said, citing that page (H. R. Rep. 491, p. 11; S. Rep. 486, p. 7; both 81st Cong., 1st sess.):

> "The phrase 'in the field' has been construed to refer to any place, whether on land or water, apart

from permanent cantonments or fortifications, where military operations are being conducted."

Under this return to General Devens' 1872 definition, *supra*, p. 14, it is plain that Tokyo at the time of Mrs. Smith's trial was not within Art. 2(10) since no military operations were being conducted there.

4. Granting that hostilities in Korea constituted a "war" for purposes of misconduct in combat (*United States* v. *Bancroft*, 3 USCMA 3, 11 CMR 3) or for purposes of the statute of limitations (*United States* v. *Ayers*, 4 USCMA 220, 15 CMR 220), it still does not follow that Tokyo in January 1953 was "in the field"—and unless it was, Art. 2(10) has no application, no more than the old pre-1916 Articles of War did. See authorities collected at pp. 43-47 of the *Covert* brief.

5. It is matter probably within the realm of judicial notice (see *Clark* v. *United States*, 99 U. S. 493, 495) that, after the commencement of hostilities in Korea in June, 1950, dependents were not sent beyond Japan. As a matter of fact dependents are not being sent to Korea even now.[11] Korea in June 1950 and until the Armistice became effective in the summer of 1953 was undoubtedly "in the field." Possibly some of Southern Korea was not. But for present purposes the short answer is that, if the Army had considered Japan to have been "in the field" in 1952 and 1953, it would neither have transported Mrs. Smith there nor suffered her to remain. In fact, Japan was no more "in the field" than were the Ports of Embarkation on the West Coast, or, for that matter, The Pentagon—and the Army's policy on dependents reflected that circumstance.

Petitioner was accordingly well advised to abandon her Art. 2(10) contentions.

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[11] Information obtained from the Office of the Deputy Chief of Staff for Personnel, Department of the Army, in April 1956.

IV. THE INVOCATION OF THE TREATY POWER CANNOT SUSTAIN COURT-MARTIAL JURISDICTION OVER A DEPENDENT WIFE IN THIS CASE EITHER

In No. 701, it was pointed out on behalf of Mrs. Covert that the treaty power was completely irrelevant to that case, in part because neither the British statute there relied on nor the exchange of notes which it implemented purported in any way to enlarge the jurisdiction of American courts-martial, and because no treaty or agreement could possibly authorize the trial of a civilian by court-martial in the District of Columbia. Appellee's brief, Point IV, pp. 92-102.

Here the situation is somewhat varied. A different agreement is involved, and Mrs. Smith was tried on Japanese soil. But, even so, the treaty power does not and cannot sustain court-martial jurisdiction over her.

A. The invocation of the treaty power is an afterthought.

Petitioner's return (R. 6-9) sets up simply Arts. 2(10) and 2(11), UCMJ. It does not make any reference whatever to the Administrative Agreement with Japan (Pet. Br. 10-12). Petitioner as well as the civilian and military counsel who represented her in the district court (R. 8, 12) regarded the present case as one involving simply an exercise of the power to govern and regulate the armed forces.

That view was in entire conformity both with the legislative history of Art. 2(11) and with the practice thereunder. See pages 93-97 of Appellee's Brief in No. 701, which are incorporated by reference, and to which the Court is respectfully referred.

Examination of the treaty materials now put forward will demonstrate that the position taken by petitioner's counsel below did not involve either oversight or any dereliction of professional duty. They were well advised not to invoke the treaty power.

B. The Administrative Agreement with Japan, fairly construed, cannot be read as conferring on American courts-martial any jurisdiction which, but for that agreement, they would not have had.

It is plain that, by Article XVII(2) of the Administrative Agreement with Japan (Pet. Br. 20-21), it was agreed that "the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality."

It is likewise plain (Art. I(e)(1); Pet. Br. 17) that Mrs. Smith was a "dependent" within the meaning of the Agreement.

Up to this point, all rests on assumption—the assumption that the Art. 2(11) jurisdiction is within powers constitutionally granted to American courts-martial. Since, under the present heading, petitioner is endeavoring to supply through the treaty power a jurisdiction that the court-martial power alone does not authorize, her proposition up to this point resembles that of the appellant in No. 701.

But petitioner in this case has something more. Art. XVII(4) of the Administrative Agreement goes on to provide (Pet. Br. 23) that:

> "4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place * * *."

This amounts on its face to a representation by Messrs. Dean Rusk and Earl Johnson, who signed the Administrative Agreement on behalf of the United States (3 U. S. Treaties at 3362), that American courts martial have power to try dependent wives and, necessarily, that Art. 2(11), UCMJ, is constitutional.

If that provision is held to be a constitutional exercise of the Clause 14 power to govern the armed forces, then no inquiry under the treaty power is necessary. But if the holding under Clause 14 should be the other way, then there is sharply posed the question as to the effect of this representation, which, under such a holding, is necessarily a mistaken representation: The service courts were willing—indeed, even eager—but they were not constitutionally able to try dependent wives in time of peace.

Thus there is presented the problem of the effect of mistakes in treaties.

In ordinary contractual dealings, a mutual mistake prevents formation of a contract. If one merchant makes a proposal dealing with a ship named *Peerless*, and the other merchant, purporting to accept that proposal, is in fact thinking of another ship of the same name, there is no meeting of the minds and hence no contract. *Raffles v. Wichelhaus*, 2 Hurl. & C. 906; see 1 Williston, *Contracts* (rev. ed.) § 95.

Is the situation different when the contracting parties are independent sovereign nations? Where the mistake is one of fact, the situation is the same. "Nearly all writers on international law who have discussed the essential conditions of a valid treaty lay down the proposition that a treaty entered into with reference to an assumed state of facts which is subsequently found to have no existence, is either void or voidable at the will of a party, because in such a case a treaty does not express the real will of the parties." Harvard Research in International Law, *Draft*

Convention on the Law of Treaties, 29 Am. J. Int. L. Supp. 1126.

To the extent, therefore, that Art. XVII(4) of the Administrative Agreement reflects a mistake of fact on the part of the signatories, it cannot, plainly enough, be given effect according to its terms.

Suppose, however, that the mistake is one of law. Then (*id.* at 1129), "Writers on international law are in general agreement that errors of law do not have the same juridical effect as is produced by errors of fact, and that international law does not recognize that states may take advantage of their ignorance of the law to free themselves from treaty obligations resulting from such ignorance."

So far as Japan was concerned, any mistake as to American law was a mistake of foreign law. By our standards, that would be, on familiar principles, a question of fact. We need not pursue the interesting inquiry thus posed, for the reason that, so far as Japan is concerned, the United States has in fact performed its obligation under Art. XVII(4). It tried Mrs. Smith, it convicted her, and up to now it has punished her by more than three years of confinement.

So, as applied to the present case, the question now presented is whether Messrs. Rusk and Johnson undertook, by representing in the Administrative Agreement that an American court-martial could try a civilian dependent in time of peace, to confer on such a court-martial powers which, but for that agreement, it did not have.

We think that they did not. Their representation was based on the statute book, and on the assumption that they were justified in taking it at full face value. They were dealing, actually, in terms of assumptions. Fairly read, it is not possible to draw from Art. XVII(4) of the Administrative Agreement any intention to enlarge or to add to jurisdiction. What was meant, and what the parties

understood, was that the American military authorities would proceed, fairly and vigorously, to try and to punish all American wrongdoers who fell within the literal terms of the Administrative Agreement, and that the American military authorities would not, under color of the exclusive jurisdiction which that Agreement gave them, simply turn such persons loose because their victims happened to be nationals of the former enemy.

Essentially, therefore, Art. XVII(4) was a representation that, so far as the United States was concerned, the jurisdiction conferred by Congress in Art. 2(11), UCMJ, would be exercised in good faith.

Fairly read in the light of the circumstances then obtaining, Art. XVII(4) was not, and was not intended as, a representation of the constitutional validity of Art. 2(11). Having in mind the assumptions of everyone in Congress in 1949 and 1950, when that provision was being enacted, that Art. 2(11) was constitutional, Art. XVII(4) of the Administrative Agreement did not represent any effort to assert, through the machinery of international negotiation, a power not conferred on the United States by its own Constitution.

C. No executive agreement could render triable by court-martial a civilian who, but for such agreement, would have been entitled to a trial by jury.

But, if, contrary to its language and to its background, Art. XVII(4) can be stretched farther, to limits that were not in the parties' minds, then a further and indeed insuperable obstacle stands in the way of the effect now claimed for it by the petitioner.

For at this juncture, petitioner's proposition necessarily is that, although court-martial jurisdiction over dependent wives cannot be justified by anything in the power to govern or regulate the armed forces, it can still be supported on the basis that American diplomats represented in an executive agreement concluded with a foreign nation

that courts-martial of the United States had such powers. Or, otherwise stated, although, but for the Administrative Agreement, Mrs. Smith enjoyed the right to a trial by jury that is guaranteed by Article III, Section 2, and again by the Sixth Amendment, she was, once that Agreement went into effect, subject to trial by court-martial.

This is not overstating petitioner's position. If the asserted jurisdiction to try Mrs. Smith by court-martial can be sustained under Clause 14, there is no need to invoke the treaty power. If it cannot be sustained under Clause 14, then the treaty power is being relied on to abridge Mrs. Smith's right to a jury trial.

The short answer is that it cannot be so used. For the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

In this position, we are on common ground with the present Solicitor General, who, only at the last Term, urged those precise limitations upon the treaty power and the power to conclude executive agreements. He said in *United States* v. *Capps*, 348 U. S. 296 (U. S. Br., No. 14, Oct. T. 1954, pp. 32, 49):

> "The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights, which govern all exercise of governmental authority in this country.
>
> * * * * *
>
> "Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

We heartily agree, and we submit that adherence to those propositions, which are far too basic to change direction from Term to Term with each passing case, requires

rejection of any contentions now advanced that are based upon an exercise of the treaty power.

V. TO THE EXTENT THAT PETITIONER'S INVOCATION OF THE NECESSARY AND PROPER CLAUSE BRINGS THE MATTER INTO THE REALM OF JUDGMENT, EXAMINATION OF THE REALITIES OF TRIAL BY COURT-MARTIAL DEMONSTRATES THAT THE PRINCIPLE OF "THE LEAST POSSIBLE POWER ADEQUATE TO THE END PROPOSED" IS ONE PREEMINENTLY APPLICABLE TO THE SCOPE OF THE MILITARY JURISDICTION

What was said under this heading in Appellee's Brief in No. 701, Point V, pp. 102-122, is fully applicable here, and is accordingly incorporated by reference.

Only a few words need to be added.

This case, like that of Mrs. Covert, makes but a poor advertisement for the extension of court-martial jurisdiction over dependent wives. It is not necessary to go to the unprinted transcript of the proceedings before the court-martial; examination of the military appellate opinions (R. 23-94) will suffice.

Here a distraught woman, who for nearly five years preceding the incident out of which these proceedings arose had been under continuous psychiatric treatment (R. 30-31, 29) was advised by the Army's medical authorities that one more hospitalization would cause her to be sent home and separated from her husband (R. 29). So she stayed away from the hospital, relied on the drugs that were prescribed for her on an out-patient basis (R. 24, 30), and, at a time when she was—at the very least—on the border line of sanity, her emotions gave way with fatal results.

At the trial level, her legal responsibility was determined, certainly in large measure, on the basis of a Technical Manual issued to the service "By order of the Secretaries of the Army and the Air Force." TM 8-240, p. ii; see the first Board of Review opinion, R. 39-43.

When military doctors on further examination arrived at a conclusion respecting her mental condition which was

more favorable to her, that conclusion was, in fairly summary fashion, brushed aside. See the second Board of Review opinion, R. 47-51. And when her case came before the highest military appellate agency, the Court of Military Appeals, only one judge there was able to find vitiating unfairness in the proceedings by reason of testimonial compulsion. Quinn, C. J., dissenting at R. 91-94.

We do not seek to reexamine or to relitigate either the issue of Mrs. Smith's sanity or the issue of whether the terms of TM 8-240 in fact improperly influenced the witnesses' testimony.

We simply ask, is it "Necessary" (Clause 18, Section 8, Article 1) to the undoubted disciplinary needs of the Army that any woman, whose only connection with the service rests on her marriage to one of its officers, be subjected to such a course of treatment? We also ask, is it "Proper" in a constitutional sense—or otherwise—that any civilian woman be thus pushed around?

CONCLUSION

The judgment of the district court should be reversed, with instructions to discharge Mrs. Dorothy Krueger Smith from petitioner's custody forthwith.

Respectfully submitted.

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